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FREEDOM OF COMPETITION AND CRIMINAL LAW*

I

In recent issues of Modern Law Review there have been interesting and informative discussions on competition and monopoly by Dr. W. Friedmann from the point of view of the civil law[1] and by Dr. W. Arthur Lewis from the point of view of economics.[2] Neither of these authors had any reason to approach the problem as one of the criminal law, which did not come under their respective spheres of interest. In the present paper an attempt will be made to fill this gap. Such an attempt might be appropriate not only because of the intrinsic significance of the subject but also because to the criminal lawyer and criminologist the matter provides an almost ideal opportunity to examine the much wider problem as to whether the criminal branch of the law is capable of dealing with large scale economic and social issues or whether its scope should better be confined to the protection of property in its simplest forms and of similar more tangible and altogether less complex values. Has the criminal law, in the economic field, to be content to penalise anti-social actions of a comparatively primitive character, mostly those types of offences committed by the poorer classes of the community, or is it equally well equipped to contribute to the solution of even the most complicated issues of modern economic policy? And if the answer should largely be in the negative, what are the consequences to be drawn for the future of criminal legislation?

Early English law is remarkable for its insistence upon the criminal

[1] 6 Mod. L. R. 1, *et seq.*
[2] 6 Mod. L. R. 97, *et seq.*

* The substance of this paper is taken from a chapter in the author's forthcoming book, *Social Reconstruction and the Future of Crime* (International Library of Sociology and Social Reconstruction, editor Dr. Karl Mannheim, published by Messrs. Kegan Paul, Trench, Trubner & Co., Ltd., London, to whom the author is indebted for their permission to publish this part in advance).

character of combinations in restraint of trade. There would be little point in re-telling this often told history.[3] In recent times, however, this country has, on the whole, turned away from the criminal to the civil law in its attempts to balance the claims of combination, monopoly, and free competition. To the English lawyer and business man, any legal system that would try to solve these problems by means of penal legislation may now seem futile and almost absurd. The Report on Trusts of 1919, whose members were "unanimously of the opinion that it would be desirable to institute in the United Kingdom machinery for the investigation of the operation of monopolies, trusts, and combines," did, apart from a few minor suggestions by Sir John Macdonell, recommend no penal legislation, and Professor John Hilton, whose "Study of Trade Organisations and Combinations in the United Kingdom" was appended to the Report, found it unnecessary to devote to the American Anti-Trust laws more than a few uncomplimentary remarks.[4] On the European Continent, too, the Sherman Act model has found no favour. In Soviet Russia, of course, whose whole economic structure is, at least since 1928, based on State monopoly to the exclusion of almost any private competition,[5] the trend of penal legislation goes even in the opposite direction. The Penal Code of 1926 contains several provisions for the safeguarding of State monopoly, as, for instance, Arts. 58 (7), 59 (11), 107, 111, 129a. It is noteworthy, however, that the Penal Code of Tsarist Russia of 1903 provided that "A merchant or manufacturer who increases the prices of victuals or other articles of prime necessity in an extraordinary degree, in accord with other merchants or manufacturers dealing in the same articles, shall be punished with imprisonment."[6]

The position is fundamentally different in the United States and in most of the British Dominions where penal provisions do exist in this field. The American Sherman Act of 1890, the various Canadian Anti-Trust Acts, and the Australian Industries Preservation Act of 1906–10 are the most remarkable examples of this kind.[7] The present paper is mainly concerned with the Sherman Act because the abundance of factual and critical material which exists about this Act—Court decisions, books, articles, and reports by official, semi-official, and non-official writers—makes it possible for the non-American to form an independent view, whereas under the Australian Act, since the amendment of 1910, there has been not a single prosecution,[8] and even the Canadian material at our disposal seems too scanty as a basis for critical analysis.

[3] See, e.g., the brief survey by Sir John Macdonell in the *Report on Trusts* (1919, Cmd. 9236), pp. 31, *et seq.*, and from the point of view of the economist, E. A. G. Robinson, *Monopoly* (1941), pp. 256 *et seq.*; for combinations of workmen, Sir Henry Slesser and Charles Baker, *Trade Union Law*, 3rd ed., 1927, pp. 178 *et seq.*

[4] See also the *Final Report of the Committee on Industry and Trade* (1929, Cmd. 3782), p. 191.

[5] See, e.g., Leonard E. Hubbard, *Soviet Labour and Industry* (1942), p. 126.

[6] Quoted from the *Report on Trusts* (1919), p. 11.

[7] The earlier Dominion Anti-trust legislation is reproduced in the *Report of Anti-trust Legislation in the British Self-governing Dominions* (1912–13, Cmd. 6439). Some later statutes, together with an admirable discussion of the whole legislation, can be found in Philip Strickland's study, *Journal of Comparative Legisl. and Intern. Law.*, 3rd Series, Vol. XVIII, 1936, p. 240, and Vol. XIX, 1937, p. 52. Moreover, the Australian Act is dealt with in an article by D. B. Copland and J. G. Norris, *Annals of the American Academy of Political and Social Science*, Vol. 147, January, 1930, p. 117.

[8] Strickland, Vol. XIX, p. 61.

In the U.S.A., it is the penal side that has been the most controversial in this highly disputed field of legislation, and the tendency to turn away from penal to civil and, in particular, to administrative methods has found its expression in subsequent enactments such as the Clayton Act and the Federal Trade Commission Act, both of 1914, which contain no penal provisions. Moreover, according to the interesting statistics given by Hamilton and Till,[9] there have been, in the first fifty years of its existence, altogether no more than 252 criminal actions under the Sherman Act, only twenty-four of which, involving ninety-six individual persons, resulted in sentences of imprisonment. During the same period, the number of cases in which fines were imposed was ninety-seven, involving about 1,500 individuals and corporations. In spite of these not very impressive figures, it would be a mistake to assume that the attempt to fight the evils of restraint of trade and of monopoly by penal legislation has been universally regarded as a failure by American expert and public opinion. A thorough scrutiny into the vast and extremely informative literature on the subject—up to the present day has the Sherman Act been living up to its early acquired reputation as "the most discussed statute of our time"[10]—shows, in spite of much criticism of detail, a not entirely negligible amount of support for the fundamental idea of the Act. And this support has come not only from those who, like Thurman Arnold,[11] Robert H. Jackson,[12] and Corwin D. Edwards,[13] have been playing a leading part in the official administration of the Anti-Trust laws, but also from independent lawyers, economists, and even business men,[14] although their belief in it may perhaps belong "to one world and the actualities of business conduct to quite another."[15] However, granted even that the penal side of the Sherman Act should have to be regarded as a complete practical failure, the mere fact would, as such, help but little to answer the crucial questions put at the beginning of this paper. It has, moreover, to be admitted that the practical effect of a penal statute does not wholly depend upon the number of convictions registered under it. Though never applied a statute may have considerable value as a deterrent,[16] Everything

[9] Walton Hamilton and Irene Till, *Anti-Trust in Action* (No. 16 of Monographs, published by the Temporary National Economic Committee, 1940), pp. 78–9, and App. A and B.

[10] Robert L. Raymond, *Journal of Political Economy*, Vol. XX (1912), p. 315.

[11] *The Folklore of Capitalism* (1937); *The Bottlenecks of Business* (1940).

[12] *The Struggle for Judicial Supremacy* (1941).

[13] "Can the Anti-trust Laws Preserve Competition?" (*American Economic Review*, Vol. XXX, Part 2, March, 1940, p. 164), and his recent paper "Thurman Arnold and the Anti-trust Laws" (*Pol. Science Quarterly*, Vol. LVIII, Sept., 1943, p. 338), which gives an interesting survey of the five years of Thurman Arnold's leadership of the Anti-trust Division of the Fed. Department of Justice up to the time of his appointment as an Asst. Justice of the U.S. Court of Appeals for the District of Columbia. There is no doubt that during that period the criminal sections of the Sherman Act have been applied more energetically than ever before.

[14] See, e.g. J. Harvey Williams, *Annals of the American Academy of Pol. and Social Science*, Vol. 165, Jan., 1933, p. 72.

[15] Hamilton and Till, p. 4.

[16] That the Sherman Act possesses some deterrent effect was not very long ago testified by a member of the New York Bar, W. G. Merritt, *Annals of the American Academy of Pol. and Social Science*, Vol. 147, Jan. 1930, p. 197. Hamilton and Till, *op. cit.*, p. 80, and Thurman Arnold, *Bottlenecks of Business*, p. 209, have emphasised that a considerable stigma is attached in the American business world, not so much to actual convictions and sentences, which are rare, but to an indictment under the Sherman Act, a state of affairs which is, generally speaking, of course, far from desirable.

will therefore turn upon a detailed analysis of the various criticisms that have been made of the Sherman Act and its practical application. Do these criticisms touch something inherent in the very nature of the criminal law or are they concerned merely with weaknesses of a casual character which might be cleared away in the light of the experiences of the past fifty years?

II

A great many factors have been held responsible by American writers for the disappointing results of the Sherman Act.

(*a*) Faulty draftsmanship: Gerald C. Henderson, the historian of the Federal Trade Commission, even goes so far as to call the Statute against Forestallers, Regraters, and Engrossers of 1552 (5 and 6 Edw. VI, Chap. 14) "from the juristic viewpoint a much more highly developed product than the Sherman Act of 1890."[17] This verdict seems to be amply borne out by the wording of the relevant sections which make an offence "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . ." (sect. 1), and penalise "every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States . . ." (sect. 2). No doubt, these are formulations which seem to go against all the old-established rules of legal draftsmanship in criminal legislation, handed over from generation to generation ever since the age of enlightenment. Instead of describing in simple terms the prohibited action, they penalise certain results of undefined actions, using antiquated legal conceptions of an ambiguous character and leaving almost everything to the discretion of the Courts. Did not already Jeremy Bentham know that "Thou shalt not steal" could "never sufficiently answer the purpose of a law. A word of so vague and unexplicit a meaning can no otherwise perform this office, than by giving a general intimation of a variety of propositions each requiring, to convey it to the apprehension, a more particular and ample assemblage of terms"[18]? Penal legislation framed in too general terms, it has been said,[19] will necessarily include actions which should not be punishable and which the legislator himself never intended to include. It is for this reason that not only the Larceny Act of 1916 but probably every modern definition of theft dissolves the term "stealing" into a considerable number of components. Even the Soviet Penal Code defines larceny at least as "the secret stealing of the property of another person," and also takes care to explain in detail the exact meaning of such terms as "robbery with violence," "misappropriation," "fraud," and all this in spite of Art. 16 which disposes of the principle *nullum crimen sine lege*. In the Sherman Act, however, not the slightest attempt is made to define what constitutes a combination, a conspiracy, restraint of trade, or monopoly, although these terms appear to be much more difficult and in need of an authentic interpretation than words such as stealing, robbery, and perhaps even fraud. It is certainly strange that the non-penal Clayton Act should have been framed in far more explicit and definite terms than the essentially penal

[17] *The Federal Trade Commission* (1924), p. 4.

[18] *Introduction to the Principles of Morals and of Legislation* (reprint of 1823 edition, Oxford), p. 331.

[19] Jerome Hall, *Theft, Law and Society* (1935), p. 67. See also Stephen, *History of Crim. Law*, Vol. III, p. 355.

Sherman Act.[20] In one case, the argument was indeed, unsuccessfully, brought forward by the defence that the Act was "so indefinite and vague as to be inoperative on its criminal side and against the requirement of due process of law."[21] In short, in the words of an American writer, "a tale of little meaning, though the words are strong,"[22] and, to quote one of its most eminent English critics, "a queer piece of drafting."[23]

Or perhaps not quite so queer and devoid of meaning? A satisfactory answer to this question would, in fact, require a discussion of the whole problem of legislative technique in criminal matters as it appears to-day. The defence of the Sherman Act has been conducted on different lines. In the first instance, it has been said, the terms "restraint of trade" and, to a smaller extent, "monopoly" are old common law conceptions with a long history of judicial precedents behind them, and, as a consequence, the Act—"our economic common law," as it has indeed been called[24]—if read "in the light of this body of authority, possessed a concreteness of meaning not otherwise apparent on its face."[25] From this point of view, the Sherman Act was necessary only because it was believed that there was no "Federal common law." However, even if this common law of restraint of trade would have been less ambiguous than it actually is,[26] it might be argued that it should not be the function of criminal legislation to preserve common law conceptions with all their vagueness. On the other hand, it is precisely that vagueness of the Sherman Act which has frequently been hailed as its greatest merit. When President Wilson, in 1914, recommended an "item-by-item" definition of the actions prohibited under the Act, this was rejected by Congress because of its "straight-jacketing effect."[27] And all the principal spokesmen of the Anti-Trust Division have, again and again, emphasised the need for the greatest elasticity, without which the objects of the law would, it seems, have been altogether unattainable.[28] "Industry is on the move and restraint moves with it."[29] As economic conditions and the organisation and technique of industry and commerce undergo incessant transformations, the organisation and technique of restraint and monopoly have to change as well. Moreover, every single branch of industry and commerce may require its own peculiar forms of restraint. From this, it follows that there are three courses open to the legislator who wants to employ the weapon of the criminal law in fighting restraint of trade and monopoly: either to frame his statute in the broadest and most general terms available, wide enough to cover any conceivable abuse that might in future arise, but at the same time flexible enough to make restrictive interpretation possible; or, if it should be

[20] Compare, e.g., the extremely vague terms of sect. 1 of the German *Reichsgesetz gegen den unlautern Wettbewerb* of the 7th June, 1909, which is concerned with damages, with the much more precise language of the penal section, sect. 4, of the same statute.

[21] *Nash* v. *United States* 229 U.S. 373 (1913). See W. H. Taft, *The Anti-Trust Act and the Supreme Court* (1914), p. 109.

[22] H. Parker Willis, *Journal of Political Economy*, Vol. XX (1912), p. 590.

[23] Sir Frederick Pollock in the *Pollock-Holmes Letters*, Vol. I, p. 164.

[24] Thurman Arnold, *The Bottlenecks of Business*, pp. 105 and 270.

[25] Milton Handler, *A Study of the Construction and Enforcement of the Federal Anti-trust Laws* (No. 38 of the Monographs published by the Temporary Economic Committee, 1941), pp. 2 and 76.

[26] Milton Handler, pp. 4 *et. seq.* See also Wyndham White, *Journal of Comp. Legislation and International Law*, 3rd Series, Vol. XX (1938), p. 35.

[27] Milton Handler, p. 96.

[28] Thurman Arnold, *The Bottlenecks of Business*, pp. 132 *et seq.*

[29] Hamilton and Till, *op. cit.* p. 15.

regarded as imperative to use specific and concrete terms, at least to make it permissible for the Courts to extend the scope of the statute by means of analogy; or, lastly, to change the wording of the statute at frequent intervals so as to keep up with changing economic conditions and techniques. The third method is likely to prove ineffective, since economic conditions and techniques will usually move much faster than the pace of the law. Again, analogy to the disadvantage of the accused is, no less than the use of general terms, against the traditional principles of, at least Continental, criminal law.[30] What else does, therefore, remain but the method used in the Sherman Act? After all, it may be said, nobody takes exception to a statute which makes it a crime to "kill" without enumerating the various methods of killing.[31] There is, of course, the difference that, while there are no degrees of killing, restraint of trade and monopoly may appear in innumerable shades. With regard to monopoly, in particular, "the Supreme Court, unaided by history and unschooled by experience, was called upon to draw the line somewhere in the scale from 0 to 100."[32] One of the many problems which the Sherman Act forces upon us is the place within penal legislation of conceptions that are not only of a general character but require also an evaluation, as contrasted with purely factual conceptions. In some ways, the Sherman Act marks the beginning of a movement which has reached its peak in the National Socialist legislative technique of systematically permeating the whole body of the criminal law with conceptions of this type.[33] The suggestion has been made that the general clause of the Act should be supplemented by more specific prohibitions of particularly harmful trade practices.[34] While this may be useful as more clearly indicating the course the legislator wants to be taken, it cannot solve the problem itself.

No wonder, then, that soon after the passing of the Act certain important adjustments should have become necessary in the general policy of the Courts.

(*b*) The Act, it was said, went too far. Under its general terms could be brought any kind of combination in restraint of trade, regardless of its merits and even when altogether inevitable. In one of the first cases decided by the Supreme Court[35] competing railway companies were prosecuted, in non-criminal proceedings, for having agreed to charge the same freight rates. "The layman naturally asks: what else could they do?"[36] The Supreme Court, too, after a brief period of confusion, abandoned the "absolute" in favour of the "functional" interpretation of the Act, confining its prohibitions to "unreasonable" acts of restraint and monopoly. This functional test was applied, in particular, in the following directions:[37]

[30] Analogy, *nullum crimen sine lege*, the creation of new common law offences on the model of *Rex* v. *Manley* (1933), 1 K.B. 529, and similar problems which loom in the background will be discussed in another chapter.

[31] See, however, Stephen, *History of the Criminal Law III*, p. 3.

[32] Handler, *op cit.*, p. 76.

[33] See, e.g. Freisler in Guertner, *Das kommende Deutsche Strafrecht, Bes. Teil*, pp. 52 *et seq.* Stephen, Vol. III, p. 357–8, however, has also emphasised the need for such terms as "reasonably," "manifestly," "for the public good," "in excess." It may be noted that his *History* was published some years before the Sherman Act.

[34] Handler, p. 97.

[35] *U.S.* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897).

[36] James T. Young, *Annals of the Amer. Academy*, Vol. 147, Jan., 1930, p. 171.

[37] For a detailed description of this change in judicial policy see Carl F. Taeusch, *Policy and Ethics in Business* (1931), pp. 113 *et seq.* Also Handler, *op. cit.*, p. 3.

Did the combination, etc., lead to a raising of consumer prices? to a limitation of production? to a deterioration in the quality of the product? to a decline in wages? to a lowering of the prices of raw materials? to unfair or oppressive treatment of competitors? The change from the absolute to the functional interpretation, which took about twenty years,[38] was performed in spite of the refusal of Congress to introduce the test of reasonableness by way of legislation. While making the Sherman Act somewhat more concrete and meaningful, it still enabled the judges to apply the statute in the light of their own ideas, prejudices, and experiences, and of their understanding of social and economic questions. The step taken by the Supreme Court has sometimes been attacked as an example of arbitrary and inadmissible "judicial legislation," and in the face of the refusal of Congress to change the law it may have looked like it. In fact, however, it seems to have been nothing but a legitimate attempt to make the best of an otherwise unworkable statute. Of special interest is the defence of the rule of reason by William H. Taft, later Chief Justice of the Supreme Court and President of the United States: "If the Court would have said: There are good trusts and bad trusts, and we have the power to say what are the good and the bad ones, according to our economic and political views . . . that would be legislation, not judicial power. The Court has only said that according to common law, which has to be used to interpret the statute, reasonable restraint was not intended to be included."[39] On the other hand, Taft criticised the Australian Industries Preservation Act of 1906–10 for "conferring on the judges and courts a power which ought never to be entrusted to them. It is submitting not to their legal, but to their economic and business judgment questions for decision that are really legislative in character."[40] It may be noted that under the Australian Act the Courts have to decide, among other points, whether an action is intended to be "to the detriment of the public," whether the preservation of a certain industry is "advantageous to the Commonwealth, having due regard to the interest of producers, workers, and consumers." Having lived through the Thirty Years' War of the *Freirechts-Schule* since Taft's book was written, we have become more conscious of the artificial character of his distinctions. We now know that, however carefully we may draft our statutes, we shall never be able altogether to avoid "judicial legislation." Nor can recourse to common law precedents secure for us absolution from this "sin." Any differences that may exist in this respect between the Australian Act and the "rule of reason" can, at most, be differences in degree. The critics of the Supreme Court may also have overlooked that a restrictive interpretation of a criminal statute is always permissible in favour of the accused, provided there are adequate reasons for it. The history of the administration of criminal justice shows an abundance of instances of this kind.[41] The real criticism which might justly be levelled against the Supreme Court is not that it introduced the test of reasonableness, but that it did not throughout apply it in an equitable manner. Proof of this,

[38] Handler, p. 7.

[39] William H. Taft, *The Anti-Trust Act and the Supreme Court* (1914), p. 114. See also Allyn A. Young, *Journ. of Pol. Economy*, Vol. XXIII, 1915, p. 209.

[40] Taft, *op. cit.*, p. 115.

[41] See also Stephen, *History*, Vol. III, p. 360: "It is one thing to say that no one shall be convicted of a crime unless his conduct is explicitly condemned by a written law. It is another thing to say that no excuse for what would otherwise be a crime shall be admitted unless it is explicitly provided for by a written law."

among others, the inclusion among the prohibited types of combinations of labour organisations without any test of reasonableness.[42] On the other hand, the initial exclusion of combinations of manufacturing firms from the scope of the Sherman Act[43] had the effect upon the public mind as well as upon Congress of discouraging hope "that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts."[44] This initial mistake, though later reversed, presented the manufacturing trusts with sufficient breathing space for further growth until they had become too powerful for judicial interference.

(*c*) In other respects, too, the Act did not seem to go far enough in spite of its general terms. It prohibited combinations in restraint of trade, but was silent about complete mergers. The acquisition of a competitor was not regarded as restraint of trade by the Courts, and only in exceptional cases was it treated as an attempt to establish a monopoly. This encouraged the growth of just that type of giant corporation which the Act had set out to prevent.[45] "Faced with the Sherman law against trusts, the promoters, who saw rich rewards to be obtained by the fusion of interests of a number of businesses, were forced to consider some such subterfuge as Holding Companies, and the expedient thus adopted has worked very well in practice,"[46]—well from the point of view of the promoters, of course. Another gap in the Sherman Act resulted from its insistence upon the existence of a "contract, combination, or conspiracy" as the only object of attack. Where price leadership was achieved by other means, i.e., by mutual imitation rather than by explicit agreement, the Act was powerless.[47] It is difficult to see, however, how this could be altogether avoided by a different formulation of the statute, although something might be achieved by way of a presumption that price leadership indicates agreement or monopoly.[48]

(*d*) So far attention has been drawn to some—by no means to all—of the weaknesses in the formulation of the Sherman Act and in its application by the Supreme Court of the U.S.A. It is, however, not only the drafting of the Act and its handling by the professional judges that are to blame. Other branches of the legal profession as well as a number of other legislative and administrative acts and omissions have to bear their fair share for any disappointment that may have occurred. There seems to be general agreement, for instance, that the temporary sabotaging of the Anti-Trust laws by the National Recovery Act of 1933, declared null and void by the Supreme Court in 1935, has had an unfortunate effect. NRA provided that the individual branches of industry could set up their own codes of business ethics, with the effect that actions which conformed to such codes

[42] Thurman Arnold, *Folklore of Capitalism*, p. 212; Robert H. Jackson, *The Struggle for Judicial Supremacy*, p. 63; J. A. Emery, "Labor Organisations and the Sherman Law," *Journal of Pol. Economy*, Vol. XX (1912), p. 899. On the present position T. Arnold, *Bottlenecks of Business*, p. 249; moreover, the *Apex Hosiery* case, 60 Supr. Court 982 (1940), and the comment on it by R. Steffen, 50 *Yale Law Journal* (1941), p. 787.

[43] *U.S.* v. *Knight*, 156 U.S. 1 (1895).

[44] William H. Taft, *op. cit.*, p. 60.

[45] Thurman Arnold, *Folklore*, p. 276; *Bottlenecks*, p. 262; Corwin D. Edwards, *Am. Econ. Rev.*, XXX, p. 178; Handler, *op. cit.*, p. 85; Peter Drucker, *The Future of Industrial Man* (1943), p. 58; Hermann Levy, *The New Industrial System* (1936), p. 167; W. Arthur Lewis, 6 MOD. L. REV., p. 108.

[46] A. J. Simons, *Holding Companies* (1927), p.4.

[47] See Note in 49 *Yale Law Journal* (1940), p. 761; Handler, *op cit.*, p. 43; Lewis, p. 110.

[48] This is suggested by Handler, p. 44–5.

were exempt from the Anti-Trust laws. This undermining of the authority of the Acts must have fostered among wide circles of the American people the view that the future belonged to unrestricted private monopoly anyhow.[49] There was, moreover, the complete failure of the Government to provide the necessary funds for the proper application of the Sherman Act. Dr. W. Arthur Lewis has already stressed the numerical inadequacy of the Anti-Trust Division's staff at the earlier stages of its history.[50] No less inferior seems to have been in former days their quality, at least if we are to judge from the statements of such writers as Professor Taeusch. Whereas, according to him, the ablest lawyers were employed by the trusts to defend them against charges under the Anti-Trust laws, muddle-headedness and inefficiency were the characteristics of many government lawyers.[51] As a result, even long before the passing of NRA, already under Harding, Coolidge, and Hoover, "industry enjoyed a moratorium from the Sherman Act," and only the most flagrant violations were taken up.[52] The evils of this system of sporadic prosecution, of "token" or "ritual" enforcement[53] have been exposed by many writers.[54] Even if a case was taken up, however, the Division had largely to rely upon the assistance of F.B.I. men, more or less unsuited for this special task.[55] On the other hand, the defence had at its disposal the biggest battalions and entered the battlefield fully equipped with the most modern and most expensive armament. In the *Madison Oil* case, we are told, there were for the defence no less than a hundred and one lawyers who had leased an entire hotel for the duration of the trial,[56] whereas the Anti-Trust Division had to be content with seven lawyers.[57] Even in cases against small industries, however, the financial resources of the defendants greatly exceeded those of the prosecution.[58] Facts of this kind must necessarily give rise to the gravest doubts whether it is not an altogether hopeless undertaking to administer Anti-Trust laws of the Sherman Act type in a country otherwise dominated by big business.

Such doubts are still further confirmed by what we hear about the attitude of juries who, in the lower Courts, had to deal with criminal charges under the Sherman Act. On their part, too, the administration of the law seems to have encountered certain obstacles which, on account of their typical character, are worthy of our attention. Considering that the Sherman Act owed its existence to the vague but very strong and widespread feeling of alarm and indignation at the unprecedented growth of the trust movement and the consequent concentration of power and wealth in the hands of a small number of individuals who exploited them mainly in their own selfish interests,[59] one might have expected that the man in the street of

[49] On N.R.A. see F. Zweig, *The Planning of Free Societies* (1942), p. 203; E. A. G. Robinson, *Monopoly*, p. 218; Robert H. Jackson, *The Struggle for Judicial Supremacy*, p. 109; Corwin D. Edwards, *Am. Econ. Rev.*, XXX, p. 166; Wyndham White, *loco cit.*, p. 40.

[50] 6 Mod. L. R., p. 107.

[51] Taeusch, *op. cit.*, p. 110. Also Robinson, *op. cit.*, p. 210.

[52] Robinson, p. 222, quoting from Paul T. Homan, *Quarterly Journal of Economics*, Vol. 54 (1939–40).

[53] Homan, *loco cit.*, p. 90.

[54] E.g. T. Arnold, *Bottlenecks of Business*, p. 191; Hamilton and Till, p. 41.

[55] Hamilton and Till, p. 40.

[56] T. Arnold, *Bottlenecks*, p. 208.

[57] Hamilton and Till, p. 42.

[58] Hamilton and Till, p. 44.

[59] See the now classical account of this development in Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (1935).

the type usually found on jury benches should have seized with perhaps even over-great zeal this opportunity to destroy that mortal enemy of his economic and political liberties. Nothing of this kind has happened. Observers are unanimous in complaining how difficult it proved to secure convictions under the Sherman Act. "In theory," writes William H. Taft,[60] "members of the public wish to draw blood, but when they are in a jury box they do not like to send their fellow-citizens to jail for doing what some years ago was only regarded as shrewd business." Even in cases where the evidence had been conclusive, the jury sometimes found the charges not proved, or, if they returned a verdict of guilty against the corporation, they acquitted its leading officials who had done all the actual work. A proposal to abolish the choice between imprisonment and fines was regarded as endangering the very existence of the Act, since juries would have never convicted if the only possible consequence of a verdict of guilty would have been prison.[61] As a result of his traditional upbringing and also of the political and economic pressure to which he was subjected, the average juryman regarded a violation of the Sherman Act as "an offence so general, so abstract, so little tainted with a general and customary imputation of immorality"[62] as to have no proper place in a Penal Code. Occasional escapades such as the earlier English laws against engrossing and the like have never been really successful and are now long forgotten.

Nor have superstitions of this kind apparently been confined to the average juryman. The most ardent and enlightened supporter of Anti-Trust legislation, Thurman Arnold himself, occasionally drops the remark that violations of the Sherman Act are no "ordinary crime," but are committed by "respectable people."[63] In other words, the tradition, now dating back over some thousands of years, which attaches the stigma of crime exclusively to stealing and similarly primitive attacks on the economic system, cannot speedily be transformed so as to cover monopolistic tendencies as well. Modern criminal legislation has, within limits, and so far mainly confined to times of war and the immediate post-war period, succeeded in building up a corresponding stigma for actions such as "profiteering," which are now regarded as "just as bad as stealing," probably because their ill effects are more directly felt by the man in the street. The evils of monopoly are usually too cleverly hidden to be realised by him. It is only in a Soviet State and through a legal system on the lines of the Soviet Penal Code, which deliberately uses the political weapon of criminal prosecution to shape the economic system according to its ideology, that old traditions of such strength can be destroyed comparatively quickly. In a capitalist democracy, it will inevitably take longer than half a century and require a much greater measure of moral and material support on the part of the community than has so far been forthcoming in the U.S.A. to make a statute of the Sherman Act type a success.

Among many other, more technical but nevertheless highly significant points the unsuitability of the rules of criminal procedure and of the law of evidence for proceedings of this kind has to be particularly stressed. These rules have been evolved as the best method to find out the truth with regard to criminal behaviour consisting of comparatively simple

[60] *Op. cit.*, p. 131. Also Corwin D. Edwards, *Am. Econ. Rev.* XXX, p. 174.
[61] Taft, p. 131.
[62] Allyn A. Young, *loco cit.*, p. 218.
[63] *Bottlenecks of Business*, pp. 97 and 135. Also Hamilton and Till, p. 78.

acts such as killing, stealing, rape, arson, and the like, where most of the evidence could be supplied by witnesses. One of their objects is to keep the scope of the proceedings within narrow limits and to avoid any complication that might cause bewilderment to the untrained minds of the jury. In Anti-Trust prosecutions, the most important evidence may consist of documents, statistics, general trends of economic policy; and it is, as a rule, not one single act but a network of trade practices, involving perhaps the whole history of the building up of a giant company, that has to be presented to a Court often unfamiliar with such topics and at every step hampered by the rules of evidence.[64] Those who have some personal experience of the technical problems involved in the disentanglement of big bankruptcy and fraud cases may be inclined to think that there is nothing out of the ordinary in this respect about Sherman Act prosecutions. There is, however, at least this additional difficulty: Whereas bankruptcy and fraud charges are usually directed against defendants who, after initial successes, have made a mess of things, prosecutions under the Sherman Act have to deal with the most prosperous adversaries at the height of their powers.

No wonder, then, that the tendency in the U.S.A. has been more and more in favour of administrative measures instead of criminal procedure, whether they may assume the official form of proceedings by the Federal Trade Commission or the inofficially developed form of an advisory opinion[65] or of the particularly interesting "consent decree,"[66] none of which have so far proved entirely satisfactory (see below).

III

Conclusions. The lessons to be drawn from this survey are fairly obvious. A few of them are mainly technical in character, others involve questions of principle and general policy, but most of them belong to both categories at the same time. Certain of the difficulties arise from the attempt to solve problems of high economic policy by means of the criminal law, others, however, are common to any legal machinery in this field.

It is chiefly a question of legislative technique to draft a statute on the lines of the Sherman Act so as to avoid its principal faults. However, such a statute, in order to remain efficient and up-to-date, would have to be framed in very general terms, and it is doubtful whether a democratic community would tolerate its vagueness, and whether the Criminal Courts, as at present constituted, would be capable of administering it in the right spirit. Ample funds would have to be allotted to the task: juries would have to be dispensed with; professional judges to be better trained in economic matters. The prosecution would have to be conducted by highly qualified specialists, familiar with the whole of the economic system of the country, and rules of procedure and of evidence would have to be worked out better adapted to the specific needs of Anti-Trust cases. All this would present very formidable difficulties, but it could be achieved, provided there should exist that consciousness of urgency and unity of purpose which alone can bring such fundamental changes within the reach of practical policy.

[64] See, e.g. Hamilton and Till, pp. 41, 51, 58, and *passim*. Corwin D. Edwards, *Am. Econ. Rev.*, XXX, p. 172.

[65] Hamilton and Till, p. 86.

[66] Thurman Arnold, *Bottlenecks of Business*, p. 141; Hamilton and Till, p. 88.

Emile Durkheim[67] has pointed out that "the only common characteristic of all crimes is that they consist . . . in acts universally disapproved of by members of each society . . . crime shocks sentiments which, for a given social system, are found in all healthy consciences." Although this requirement of universal disapproval may appear somewhat exaggerated, there can be no doubt that without the backing of at least the major part of the community criminal legislation, in a democracy, must fail. Such support will be forthcoming only if individual members are conscious of the real meaning of the law, its objects, and its necessity. Closely connected with this is the other requirement that each single piece of criminal legislation should be in harmony with the social and economic structure and the whole ideology of the community in which it is expected to function. That structure and ideology cannot be changed by means of haphazard and sporadic legislative titbits.

How far does the Sherman Act comply with these basic requirements? At the time when it was passed the Act might have been regarded as the incarnation and logical fulfilment of that philosophy of *laissez faire* and free competition which dominated American life. Now, that idol has irretrievably lost its former attraction and absolute character, and nothing is any more taken for granted in this sphere. Free competition, just as monopoly, may be good or bad according to circumstances, and, to a large extent, the real issue is no longer between these two alternatives but between private or public monopoly. Sherman Act enthusiasts, no less than the Supreme Court, have of course not failed to realise these complications. Proof of this is not only the introduction of the rule of reason but also the repeated assurance that it is not "bigness as such," not "mere size," but bigness leading to inefficiency that has to be fought.[68] This tactical change of front, however, was bound to deprive the Act of most of its emotional appeal for the man in the street. To stamp out murder, kidnapping, robbery, rape, and profiteering may have a magic of its own. There is little glamour in charges of "restraint" and "monopoly" as soon as they are diluted with the "rule of reason" and the test of inefficiency. If efficiency is the keynote, the whole struggle may lose its moral background, and, after all, there are other values besides efficiency worth fighting for. Again, is it practicable to select for criminal prosecution just one isolated type of abuse of economic power in a social, economic, legal, and political system otherwise based upon the principle, and imbued with the spirit, of private profit-making? It is neither particularly fair nor is it likely to succeed. Business men, it has been said, are torn between the desire to have all the advantages of monopoly for themselves and all the disadvantages of free competition for their competitors, and, at last, racketeering presented a temporary, though not altogether desirable, solution by offering that protection against competition which monopoly could no longer give.[69]

All this justifies Laski's verdict that "the scale of the problem is beyond the power of a government that is subject to the normal pressure politics of capitalist democracy."[70] And there is in this respect but a difference in degree between the criminal, the civil, and the administrative side of Anti-Trust legislation. Such a difference does, however, exist. The

[67] *Division of Labor in Society* (English translation by George Simpson, 1933), pp. 70 *et. seq.*

[68] Thurman Arnold, *Bottlenecks of Business*, pp. 3–4 and *passim*.

[69] See the interesting remarks by Donald R. Taft, *Criminology* (1942), p. 188.

[70] Harold J. Laski, *Reflections on the Revolutions of our Time* (1943), p. 325.

criminal law has, quite definitely, to play an important part in the matter, but it cannot fulfil its task unaided. A good deal of the failure of the Sherman Act has been due, it seems, to two legislative mistakes; first, to the placing of an over-great burden on the criminal sections of the statute and, secondly, to the absence of any organic link between them and the existing civil and administrative machinery. As already pointed out, the extreme vagueness and elasticity of the Sherman Act is inevitable for the sake of efficiency, but it has made the Act much too difficult to administer as a criminal statute. Again, the Clayton Act is more specific, but there is no penal machinery behind it or behind the Federal Trade Commission Act. The best solution would seem to be a combination between the administrative procedure of these two Acts and the possibility to impose heavy penalties in suitable cases. As these penalties would have to be decided upon by Criminal Courts, the old problem would arise of how far the latter should be bound by statements of fact arrived at by administrative agencies. If the Courts would be called upon to punish what an administrative body has branded as "unreasonable restraint of trade," they would rebel and insist upon independent powers of control which would frustrate the scheme. If, however, the actions to be punished would consist mainly in technicalities, the problem would be manageable. It is probably for such reasons that the suggestion has been made to devise a system which would require the fullest publicity for all business activities of trusts. Any failure would involve heavy, if necessary even crippling penalties.[71] While this would facilitate the task of the administrative agency charged with the supervision of trusts, it would leave to the Criminal Courts mainly technical questions which would be easier to deal with. The need for publicity has recently been admitted even by business leaders. There will be much dispute about its extent. The general line of policy, however, seems to be fairly obvious as far as the division of powers between administrative and criminal procedure is concerned. It is a division which, by the way, is becoming more and more common and to which may belong the future.[72]

HERMANN MANNHEIM.

WORKMEN'S COMPENSATION COMMON LAW REMEDIES AND THE BEVERIDGE REPORT

I. THE BEVERIDGE REPORT AND WORKMEN'S COMPENSATION

THE proposals of the Beveridge Report on Workmen's Compensation have received surprisingly little attention beyond some early broadsides from the batteries of certain interested parties who were opposed, under any circumstances, to the inclusion of workmen's compensation in a comprehensive scheme of social insurance. There has also not been as much reaction as might have been expected from organised labour to proposals which involve a contribution from the worker, though

[71] See Handler, *op. cit.*, pp. 92 *et seq.* In order to prevent the imposition of obstructively low penalties, statutory minima may have to be resorted to.

[72] Other instances of this general trend and the special problems arising from it will be discussed in other parts of the book.

it was always understood that such a proposal was not regarded with much favour in that quarter. It may be it is now considered that the advantages of a comprehensive scheme of social insurance, covered by a composite weekly payment, outweigh the objections to the workman making contributions to the insurance fund.

Workmen's compensation is a highly specialised branch of industrial law and though circumstances arising from the war have focussed public attention on certain aspects of the present system, it remains, from an administrative point of view, a matter for the expert.

Whatever may be the fate of the proposals in the Beveridge Report, it is worth while considering such proposals and some of the implications and possibilities which arise, because it seems to be generally accepted that the present patchwork of legislation and case law which make up the "system" as we know it to-day requires an early and drastic overhaul.

Part II of the Report sets out the changes involved in the establishment of unified social security. Change No. 4 proposes the supersession of the present scheme of workmen's compensation and the inclusion of provision for industrial accident or disease within the unified social insurance scheme, subject to (*a*) a special method of meeting the cost of this provision, and (*b*) special pensions for prolonged disability and grants to dependants in cases of death due to such causes.

As regards benefit, the proposals are that for the first 13 weeks of incapacity, payment shall be made at the same flat rates irrespective of earnings on the suggested scale in Par. 401; after the first 13 weeks of disability compensation to be paid on a different principle taking into account the earnings that have been lost; there will be industrial pensions for prolonged incapacity due to accident or disease arising out of and in the course of employment. There will be industrial grants for dependants, in addition to the general widowhood provisions, where death results from such accident or disease. Benefit will be paid forthwith, because as a rule there will be no necessity to ascertain the cause of disability before making payment, the ascertainment of the cause of disability will make a practical difference only where disability lasts more than 13 weeks when the compensation has to be adjusted to earnings. Any question arising in regard to the assessment of compensation where the disability lasts over 13 weeks can be adjusted by administrative machinery subject to appeal to special tribunals in the place of litigation.

All the other benefits of the unified insurance scheme to which an insured person is entitled will be equally available to a workman disabled by accident.

The Report postulates that the advantages of unified social insurance are great and unquestionable and that such unification can only be achieved by certain changes in the existing administrative machinery. The arguments in favour of change No. 4 are set out in Paras. 77–105 of the Report. It is very fairly stated that the present system of workmen's compensation has conferred benefits and has certain merits, and that if the author of the Report has come to the conclusion that the system should be superseded in a unified plan for Social Security, this conclusion rests not on a denial of any good in the present system but on the possibility of replacing it by a better system. "Neither in this, nor in any other field, should the good be allowed to be the enemy of the better." While not conceding that the present system deserves the qualifying adjective of "good," we are only too ready to agree that it can be replaced by a better.

There are few people to-day with practical experience of workmen's compensation who, if they approach the subject with the same singleness of mind as the author of the report, will deny that the present system is unsatisfactory and that it can be replaced by a better, even though they may demur from the conclusion that the better way is the way recommended by the Report.

Much time and paper could be used up on a detailed account of the disadvantages of the present system; the insufficiency of the compensation payable, particularly in the case of injured workmen with families dependent upon them; delays in payment; the complicated system of dealing with industrial disease; the absence of any scheme for rehabilitation; the assessment of average weekly earnings; lump sum settlements and the employer's right of redemption; the existence of vested interests essentially incompatible with the interests of the injured workman for whose benefit alone the scheme exists; excessive and unnecessary litigation; the absence of provision for medical treatment and surgical appliances. But is such a detailed account necessary?[1] The main disadvantage of the system is fundamental, the defects are only the inevitable consequences of that fundamental defect which we contend is the employer's personal liability to his workman for payment of compensation.

II. Development of Workmen's Compensation

The present "system" of workmen's compensation is contained in a large number of statutes interpreted by a considerable body of case law. Up to date there are 37 volumes of Butterworth's compensation cases and the Statute Law consists of—

1. The Workmen's Compensation Act of 1923 amending the Act of 1906 and the Acts amending that Act.
2. The Workmen's Compensation Act, 1925—a Consolidating Act.
3. An Amending Act of 1926.
4. The Workmen's Compensation (Silicosis and Asbestosis) Act, 1930.
5. An Amending Act of 1931.
6. The Adoption of Children (Workmen's Compensation) Act, 1934.
7. The Workmen's Compensation (Coal Mines) Act, 1934.
8. An Amending Act of 1938.
9. Workmen's Compensation Act, 1940.
10. Workmen's Compensation Act, 1943.
11. Workmen's Compensation Act, 1943 (No. 2).

Add to these the various schemes dealing with Industrial Diseases and in particular those relating to Silicosis and Asbestosis and it will be realised that the present "system" is at least lacking in the virtue of simplicity. It may be argued that the last three Acts became necessary because of conditions arising from the war, but surely the fact that it is necessary to pass three Acts of Parliament to amend the system in an emergency, is proof that the system is too rigid to deal with such a complex of problems as arises in the field of industrial accident and disease. Nor did these Amending Acts only deal with difficulties arising from the war. They also dealt with obvious injustices which organised labour had been striving for years to have remedied, but which it took a war to get put right.

[1] For a detailed and careful survey see *Social Security* (ed. Robson), in particular Chap. II, by R. Chambers; further, Chambers, 5 Mod. L. R. 113, and, in defence of the existing system, Hammond, *ibid.*, p. 113.

It will be admitted that the basic aim of any Workmen's Compensation system is to provide an adequate measure of compensation for workmen and their dependants for injuries received at work. That is elementary, but there is a danger of forgetting the basic purpose where organised interests have become an integral part of the system, for example, the interests of the legal profession, the medical profession, and the insurance companies. These interests should be disregarded so far as they conflict with the basic aim of providing a simple and adequate scheme of compensation for the injured workman and his dependants.

The existing system is based upon an absolute legal liability which the law places upon each employer to compensate any employee for loss of earning capacity due to accident (including industrial disease) arising out of and in the course of his employment. The first Workmen's Compensation Act of 1897 introduced a new principle into English Law by making an employer legally liable for compensation to an injured workman irrespective of any negligence on the employer's part.

As the Holman Gregory Report stated, "The Workmen's Compensation Act of 1897 effected a revolution in the branch of law which concerns relationships between employers and workmen. It set up an entirely new doctrine and provided rights and imposed obligations which nowhere fitted into the existing scheme of jurisprudence." There has been no departure from that basic principle in any of the successive Acts which have followed up to the present day.

As stated before, it is considered by many people who have had practical experience in the working of the present system that the major defect of the system is this basic principle which imposes upon the employer a legal liability to compensate his injured workman—a legal right was given to the workman against his employer, a right which in the last resort rests in the threat or the practice of litigation. Possibly if our ideas on social insurance had been more advanced in 1897, workmen's compensation might have been dealt with on the lines of social insurance. There were those who then advocated a comprehensive scheme of compulsory State Insurance, but there was strong opposition to the idea. Mr. Asquith, in the course of a debate in 1893, stated that—

> ". . . while a general scheme of insurance against accidents of all kinds has a great many things to recommend it, yet it has this great drawback; that it affords no security and no incentive for the exercise of care on the part of the employer. A system of industrial insurance, unless it is safeguarded by an ancillary law, making the employer liable—I do not say whether by criminal or civil proceedings —for accidents due to his own negligence, would be rather a retrograde than a progressive measure."

This view also seems to have been that of the Trade Unions, because at the Trade Union Congress in 1877 a proposal for the universal provision of compensation for all accidents by a fund to be provided by a tax on commodities was defeated. Thomas Halliday, a miners' leader, said that "what they wanted was not money but their lives and limbs preserved" (Wilson and Levy, *Workmen's Compensation*, p. 60). This conflict between the preventive and the compensatory aspects of industrial accident is a live issue in a consideration of the Beveridge proposals, especially in regard to the suggestions with regard to the abolition of alternative remedies, and will be dealt with later in this article. There is little doubt

that the authors of the Act of 1897 hoped that the administration of the Act would be simple and inexpensive. Mr. Chamberlain said in the course of the debates that "we should have our words so simple that they are not likely to be the subject of material litigation." What they would say to-day if they could contemplate the serried ranks of "Butterworths" must be left to the reader's imagination! Quite apart from the cost of this litigation is the undoubted fact that workmen's compensation has for many years been an irritating factor in the relationships between employers and workmen. The injured workman with his right of action against his employer identifies his employer with every grievance, real or imagined, which he has, irrespective of the fact that in most cases the employer has covered his liability by insurance. This leads in many cases to deep and bitter resentment and has done more to widen the gulf between the two classes than many people realise.

There have been various opportunities of revising the system. A Departmental Committee set up by the Home Secretary in 1903, in their conclusions, stated that—

> "Many witnesses have suggested that some system of national insurance should be established which would relieve the employers from all personal liability except that of providing the necessary funds. Any such proposal would require and will doubtless receive the fullest consideration from the legislature. It may be that the State should establish or regulate a system of insurance which would provide for every employer and for every workman complete security. It may be that a State policy might protect the employer from all personal liability except the payment of the premium. It may be that ultimately some form of compulsion might be adopted requiring all employers to insure their workmen in some association under State regulations. It may be that under such a system, larger benefits than those given by the present Act might be provided for, but in that case it would follow that some contribution proportionate to the increase of benefit should be made by the workman to the insurance fund. These and similar questions are in prospect. But it would be premature and beyond our commission to discuss them. We can only indicate that, beneficial as we believe the legislation of 1897 to have been on the whole, we do not think it can be regarded otherwise than as a step in the direction of a more comprehensive scheme."

How near the Committee came to the same conclusions as those embodied in Change No. 4 will be appreciated by a comparison of this statement with the proposals of the Report. But it was "beyond their commission to discuss" the possibilities which they evidently regarded with some favour and they contented themselves with the indication that the goal was a comprehensive scheme involving "may be" the abolition of the personal liability of the employer. The result of the findings of the Committee was the Workmen's Compensation Act of 1906, which did not depart from the basic principle of the employer's personal liability but extended the scope of the law, increased the amounts of compensation payable, and enlarged the legal rights of the injured workman. The second opportunity came when the Holman Gregory Committee was appointed in 1920. This Committee did have in its terms of reference the investigation of a system of accident insurance under the control and supervision of the State. It will be borne in mind that at this date a State scheme of insurance

against sickness had been in operation since 1911 and against unemployment since 1919, so that the Committee had no reason to be unduly apprehensive of the bogey of State interference, though they certainly had to take into account the well-established interests of the commercial insurance companies which would be in danger from any State scheme. Again this Committee decided to adhere to the basic principle of the 1897 Act. They evidently did not regard that Act in the same light as the 1903 Committee as "a step in the direction of a more comprehensive scheme," because their decision was that "the present system should continue." It is true they recommended compulsory insurance, but only within the framework of private insurance. One cannot do better than quote this comment on the findings of the Holman Gregory Committee in Wilson and Levy's *Workmen's Compensation* (p. 225)—

> "The Committee's almost cynical dictum 'The present system to continue' was printed side by side with irrefragable proof as to the need of radical changes in a system which the Committee proposed to perpetuate. . . . The Committee was unanimous in rejecting State interference, which might take the administration of Workmen's Compensation out of the hands of private interests and subject it to the supervision and control of the State. But the reforms which it sponsored involved State intervention without State responsibility for its consequences. Had the experience of the past forty years justified this ambiguous attitude on the part of the Committee? We have tried to show that this question must be answered in the negative. The evidence not only of the representatives of the Labour party but of many other witnesses with no political affiliations gave a very disquieting picture of deficiencies and evils. The main grievance had remained. Insurance companies and mutual associations alike were trying eagerly to rid themselves either totally or partially of the claims which might be or actually were put forward in connexion with accidents. In other countries official or quasi-official bodies were intervening impartially between the employer and the workman. In England a third party, namely the insurance offices, had been set up between employer and employed, whose business it was to relieve the former of his responsibility towards the latter in cases of injury, and to do so on a competitive profit-making basis."

"Irrefragable proof of the need for radical changes" were before the Commission, but no radical changes resulted. "Insurance companies and mutual associations alike trying eagerly to rid themselves of the claims which might be or actually were, put forward in connexion with accidents" —words as true to-day as they were in 1920. However strongly one may feel about this problem of insurance against industrial accidents on a profit-making basis, no blame can be attached to the companies themselves, in fact, it is obvious that the system could not have worked without them. They are not philanthropic concerns and it would be hypocrisy to blame them for conducting their business as they have done. But that is no reason why this state of things should continue.

An Amending Act followed the Commission in 1923, adhering to the recommendation that the system should continue, though the proposal for compulsory insurance was rejected. The number of workers entitled to the benefits of the Act was increased, there were bigger rates of compensation, the requirements as to notice of accident and the claim for

compensation were simplified, the rights of the employer to reduce and terminate the compensation were restricted and there was an endeavour to improve, without substantially altering, the position as to lump sum settlements. But no attempt was made to deal with the fundamental defect of the system, with the inevitable result that litigation flourished and more amending legislation was required. To-day no one is satisfied with the system in spite of all the patching and tinkering. It is, and will remain, a source of grievance until we get a Government courageous enough to disregard all vested interests, in whatever quarter they exist, and translate the "may be's" of the 1903 Committee into established facts.

Once more opportunity knocks at the door. It would be a tragedy if the door remained bolted and barred.

III. Alternative Remedies in Common Law

Prior to the Employers' Liability Act of 1880 the injured workman had only his Common Law remedy against his employer and that was grievously restricted by the doctrine of Common Employment, a doctrine based on a judicially implied contract between workman and employer, a doctrine which Mr. Asquith described as "fictitious," for "The Common Law of this country does not, as a rule, imply contracts which are not expressed."[2] However that may be, the rule operated so greatly to the disadvantage of the workman that Parliament passed the Employers' Liability Act, which endeavoured to mitigate the severity of its application, but went no further, and the Common Law remedy for negligence remained the workman's chief remedy against his employer for injuries resulting from an accident at work until the Workmen's Compensation Act was passed in 1897. This Act and the successive Workmen's Compensation Acts, while leaving the workman his Common Law rights against his employer as an alternative remedy, gave him a new right of action against his employer, irrespective of negligence. The injured workman therefore naturally turned from the restricted Common Law remedy to the wider remedy granted to him. Claims under the Employers' Liability Act and at Common Law became rare as compared with the claims under the new system until recent years, when as a result of legal decisions and of Factory legislation, a new impetus was given to Common Law claims.

In *Groves* v. *Wimborne*, (1898) 2 Q.B. 401, it was held that the occupier of a factory who omits to fence dangerous machinery, or to provide and maintain proper appliances of every description, is also guilty of negligence, and a Common Law action for damages will lie against him at the suit of an injured workman and that to such an action the doctrine of common employment was no defence. The passing of the Factory Act of 1937, which imposed more stringent statutory obligations upon the employer in regard to the safety of the workman, considerably widened the field for the application of this decision and advantage was taken of it by the legal advisers of injured workmen to put forward Common Law claims in cases where a breach of the Act or the regulations could be substantiated.

In the same year of 1937, when the Factory Act was passed, the decision of the House of Lords in *Wilsons & Clyde Coal Co., Ltd.* v.

[2] This is a juristically very dubious proposition; but it rightly exposes the fiction of imparting terms appropriate to a highly personal relationship to the conditions of mass employment prevalent in modern industry. On the doctrine of common employment, see Robson and Gold, 1 Mod. L. R. 224; Unger, 2 Mod. L. R. 43; Chapman, 2 Mod. L. R. 291; Winfield, Textbook, 2nd ed., 142–156,

English, (1938) A.C. 57, still further increased the opportunities of the injured workman to use his Common Law remedy.[3]

It was held that—

1. Employers are not absolved from their duty to take due care in the provision of a reasonably safe system of working by the appointment of a competent person to perform that duty. Although the employers might, and in some events were bound to, appoint someone as their agent in the discharge of their duty, the employers remained responsible.

2. The doctrine of common employment does not apply where it is proved that a defective system of working has been provided. To provide a proper system of working is a paramount duty and, if it is delegated by the master to another, the master still remains liable.

To summarise these developments in case law and legislation, three legal developments, above all, have greatly affected the functioning of Workmen's Compensation—

1. Cases such as *Groves* v. *Wimborne*, (1898) 2 Q.B. 402, and the *Lochgelly* case (1934), A.C. 1, establishing that—

(*a*) A breach of statutory duty is presumed to be negligence so as to make the proof of actual negligence unnecessary for the plaintiff and the proof of its absence inadmissible for the defendant;

(*b*) Common employment is no defence to such an action.

2. The Factory Act of 1937, increasing statutory obligations of employer towards workmen *re* safety.

3. *Wilson & Clyde Coal Co.* v. *English*, (1938) A.C. 57, establishing that—

(*a*) Maintenance of a safe system is a paramount duty of the employer;

(*b*) Common employment is no defence to an action for breach of such duty.

Another factor which influenced the trend towards considering the alternative remedy at common law in cases of industrial accident was—the compensation payable and the damages recoverable in a Common Law action, which damages included loss of earnings for the period of incapacity, both past and future, medical and other expenses, and a substantial amount (according to the circumstances) for pain and suffering. The growth of the number of actions for damages arising out of road accident cases—many widely reported in the Press, had also a definite effect on the minds of the workers. They were not slow to make comparisons and deductions (the latter often erroneous).

Dissatisfied clients would send in cuttings from newspapers recording the amount received in a road accident case, or in a Common Law action for negligence, asking why a lump sum settlement under the Workmen's Compensation Act, which they had been advised to accept, was so small in comparison, as indeed it was. Consider the case of a widow with young children whose husband was killed at work and who was entitled to the maximum of £600 under the Act. How could one explain to her the distinction between her case and that of a widow whose husband was killed by a negligent motorist outside the works' gate and who got a verdict for

[3] For some recent examples, see below, p. 21.

£2,500? One could explain the legal grounds for the difference in the two amounts but one would find it hard to give any rational and satisfying explanation to the widow whose claim was under the Workmen's Compensation Acts.

In cases of non-fatal industrial accidents the financial difference between compensation and damages is not so obvious as in fatal cases (even when the rate of compensation was only 30s. a week), especially in cases where incapacity is of uncertain duration. There is no certainty about the amount of damages recoverable, and when future earning capacity is in question, the workman's probable future loss may easily be underestimated without any opportunity of correction later. Nevertheless, it may be stated as a general rule that as between compensation and damages in any one particular case, the probabilities are that the workman will benefit fairly substantially by electing to proceed at Common Law, and there is no doubt that in recent years the proportion of Common Law claims arising out of industrial accidents has increased very considerably.

The following figures are taken from the records of the Iron and Steel Trades Confederation, the Trade Union which covers the Iron, Steel and Tinplate Trades. This union provides legal benefit for their injured members from the date of the accident, and the figures are taken from the quarterly reports of cases dealt with on behalf of their members.

Cases Reported	*Common Law Claims Made*
1936: 977	3
1937: 967	1
1938: 884	8
1939: 920	18
1940: 954	35
1941: 1063	50
1942: 1301	70
1943: 1286	178

It will be noted that there is a substantial increase in the number of accidents reported, but this is due largely to increased membership of this vital war industry. But even allowing for other factors, the steady increase in Common Law claims since 1937 would seem to justify the argument put forward. Of one thing there is not the slightest doubt, that every report of an industrial accident is now very closely scrutinised by the workman's legal advisers to see if the facts justify a claim at Common Law, and if there is a fair chance of success such a claim is put forward in preference to a claim for compensation. The reason is obvious—now that there have been substantial inroads on the application of the doctrine of common employment and with the stringent requirements of the Factory Act and Regulations the workman and his advisors (particularly where the workman has the backing of a union) prefer the chances of a successful Common Law action, with its financial advantages, to the certainty of compensation.

Another House of Lords decision in 1937 should be mentioned here, because of its bearing on the measure of damages in fatal cases. In *Rose* v. *Ford*, (1937) A.C. 826, the House of Lords considered the position arising under Section 1 (1) (2) of the Law Reform (Miscellaneous Provisions) Act, 1934, where a claim was made for damages for loss of expectation of life by the administrator on behalf of the estate of a deceased person killed in a motor accident. It was held that a living person could claim damages for such loss (*Flint* v. *Lovell*, (1935) 1 K.B. 354)—and that such right

vested in the deceased in life and, on death, passed to the personal representative under Sect. 1 of the Act, that there was no duplication of damages under the Act and the Fatal Accidents Acts. It will be noted that the Court considered, so far as the claim of a living person was concerned, shortening of life was and always had been an item to be taken into account in the assessment of damages—the novelty of the decision lay in its interpretation of the effect of Sect. 1 of the Law Reform Act.[4] But from the point of view of industrial accidents there was not much value in the decision, because it was further held there was no duplication of damages. "If those who benefit under the Fatal Accidents Act also benefit under the will or intestacy of the deceased, their damages under the Act will be abated accordingly" (Lord Atkin, in *Rose* v. *Ford*). This rule was acted on generally in practice in preference to the alternative suggestion of Lord Wright, in the same case, that the loss consequent upon shortening of life is reduced by an award under the Fatal Accidents Act, but it was challenged in the case of *Davies and Another* v. *Powell Dyffryn Associated Collieries, Ltd.*, (1941) 1 All E.R. 657, the challenge being based on the wording of sub-sect. 5 of sect. 1 of the Law Reform Act, which stated that the rights conferred by the Act are in addition to and not in derogation of any rights conferred by the Fatal Accidents Act. Their Lordships held that the matter was purely one of construction of the subsection and that the view of Lord Atkin in *Rose* v. *Ford* was the correct one.

So far as fatal industrial accidents are concerned, it is usually found that where a widow and dependants are left, the widow is the administratrix of the estate under an intestacy. Claims are therefore made under both Lord Campbell's Act and the Law Reform Act. If a settlement is negotiated the amount recovered is allocated between the respective claims as is convenient according to the circumstances of the case. If a verdict is obtained from the Courts the amount awarded under the Law Reform Act (which belongs to the estate of the deceased) is set off against the amount recovered by the dependants in their action under the Lord Campbell's Act. So far as the amount of damages is concerned it is therefore a case of "as you were!"[5]

The amount of damages recoverable for loss of expectation of life has been considerably reduced by the decision of the House of Lords in *Benham* v. *Gambling*, (1941), 1 All E.R. 7.[6] The assessment of damages under this head had been a matter of great difficulty and widely varying amounts had been arrived at. While no definite ruling was given as to amounts, Viscount Simon, L.C., stated that "whether in the case of a child or an adult a very moderate figure should be chosen." In the particular case before the Court—a claim in respect of a child aged two and a half years at the time of its death—it was held that a sum of £200 was the proper figure. The practical effect of this decision is that in claims under the Law Reform Act the amount recovered is generally somewhere between £200 and £300. But in the recent case of *Garcia* v. *Harland & Wolff*, (1943) 2 All E.R. 477, Atkinson, J., awarded £500 for the death of an electrician of 27 years of age in good health and happily married.

[4] For a full discussion of the various legal aspects, see Seaborne Davies, 2 MOD. L. R. 64, Kahn-Freund, 5 MOD. L. R. 81, Glanville Williams, 5 MOD. L. R. 68.

[5] For a detailed consideration of the different possibilities, see Gl. Williams, 5 MOD. L. R. 68.

[6] On this decision, cf. Kahn-Freund, *loc. cit.*

IV. Reform of Workmen's Compensation and Alternative Remedies

Assuming that the proposals of the Beveridge Report are accepted and become law; or that some other system of administering Workmen's Compensation is enacted which, so far as benefits are concerned, is as favourable to the workman as the proposals of the Report, how is the workman's alternative remedy at Common Law to be dealt with? Paragraphs 258–264 of the Report consider this problem in relation to industrial accidents and also in other types of claims against a third party with which we are not concerned in this article. Two questions are propounded in the Report—

> 1. How far should the possible existence of these other rights of the person in need of income affect his claim under the social insurance scheme?
>
> 2. Should the developments now proposed on social insurance be accompanied by any change of these other rights?

The report postulates one general principle which no one would challenge—the possible existence of an alternative remedy should not prevent an insured person from getting forthwith whatever social security benefits he would be entitled to claim if he had no such remedy. It is pointed out that the testing of an alternative remedy takes time, the needs of the person should be met at once; the prompt maintenance of income is of the essence of social security and it is therefore submitted that the power to refuse sickness benefit to a disabled workman should be ended, and also the requirement that the workman must elect between claiming under Workmen's Compensation and claiming at Common Law.

It is undoubtedly good business and sound common sense to cover the gap between the onset of incapacity to earn and the receipt of compensation or damages. The power to close the gap is already there to a limited extent. Approved societies have the right to make advances by way of loan to members pursuing a claim against their employers for damages, and this right is widely exercised (National Health Insurance Act, 1936, sect. 52). Many Trade Unions also make voluntary advances to members in similar circumstances.

As to the question of election between workmen's compensation and damages there seems no justification for retaining this if the Common Law remedy is to remain. At present a workman can pursue his remedy at Common Law and reserve his right to compensation if he fails in his claim, but if he makes a binding election and takes workmen's compensation he is barred from pursuing his claim at Common Law. Many workmen have the advantage of expert assistance through their Trade Unions, but not all workmen are in this fortunate position. There must be many who through lack of such advice at the proper time and as a result of economic pressure, accept compensation and lose their Common Law remedy. This dilemma has been partially solved by a recent agreement with the Insurance Companies, who have undertaken that they will not plead election by acceptance of compensation if proceedings are commenced within three months. But there seems no valid reason why the requirement of election should not be abolished altogether. As a workman cannot recover both compensation and damages, the employer can always obtain repayment of compensation already paid out of the damages recovered.

This leads on to the second general principle laid down by the Report

—that the injured person should not have the same need met twice. Benefit under the scheme should be paid promptly to the injured person without prejudice to any alternative remedy, but if there proves to be an alternative remedy, he should not get more from the two sources than he would get from one alone. This could be done in either of two ways—

1. The third party remains liable to pay whatever is due from him as if there were no benefit, but the injured person when he receives his damages refunds to the Social Insurance Fund what he has received from the Fund as benefit.

2. The amount of the injured person's claim against a third party is reduced by whatever he may claim as benefit.

In favour of the first method it is argued that there is no reason why a person guilty of negligence should pay less than he would otherwise because the person injured is insured against injury; and in favour of the second method that if comprehensive provision is made by the State for injury, however caused, the damage done to the injured person by the negligence of the third party is only any excess of the actual loss over the amount of the State's provision. The suggestion is then made, which is followed up later in the report, that insurance provision might exclude altogether actions for damages in cases where they could be brought now. The injured workman would then be deprived of his existing alternative remedy at Common Law and left with his rights under the compensation scheme. The report propounds the question but makes no recommendation. From the point of view of the workman, much will depend on the provisions of the scheme under which he is to be compensated for his incapacity. If the benefits are so substantial that they compare favourably with what might be expected to result from the retention of the Common Law remedy, the argument for its abolition in the case of industrial accidents might be accepted, but organised labour would certainly want to be satisfied that the new scheme, whatever its nature, gave the workman adequate consideration for such surrender. Would it not be the better way to allow the Common Law remedy to remain, leaving it to time and experience to provide the solution? If the new scheme proves by such experience in actual practice to be, by comparison, sufficiently favourable to the workman, it is more than likely that the Common Law remedy will gradually fall out of favour as has been the case with the Employers' Liability Act of 1880.

A positive argument in favour of retaining the Common Law remedy is that its existence tends to make employers more vigilant as regards the safety of their employees, even though they cover their liability by insurance. Although an employer may be insured against the financial consequences of any neglect, it is only natural that he should strongly dislike the prospects of an action for negligence and presumably therefore in his own interests he would take every precaution to obviate any cause of such an action.

It might justly be argued that the good employer will do all he can for the safety of his employees because he is a good employer, and that the bad employer will continue to take chances without losing a night's sleep. It may also be argued that the distinction between negligence and strict liability, whether under Statute or Common Law, is becoming increasingly difficult to maintain.[7] But the prospect of an action for negligence will probably be a spur to the good employer to ensure the fullest

[7] Cf. Friedmann, 1 Mod. L. R. 39, 57; 4 Mod. L. R. 143.

security possible and to act accordingly. So far as the bad employer is concerned, if his accident ratio is unduly high, or if his records show frequent cases of liability for breach of Statutory or Common Law duties, he will find his risk unacceptable to insurers or the rate which is asked for cover so high that he will be forced to amend his ways. This acts as a kind of unofficial penalty.

There is no doubt that whatever scheme is adopted with regard to industrial accident, and whether the Common Law remedy is retained or abolished, the preventive and compensatory aspects should be complementary and not conflicting. There should be some provision in any scheme for penalising the employer who has an excessive number of accidents and the employer whose employee has suffered injury as a result of negligence.

The Factory Act provides penalties for breaches of the Act and regulations, but it is questionable if they are severe enough to act as a deterrent. There is really no excuse for failure to comply with the safety requirements of the Act. It took many years to get it on the Statute Book and in the course of its passage through Parliament it was subjected to the closest scrutiny. No insurance scheme covering the industrial accident risk will work satisfactorily which does not impose exemplary penalties on the employer who fails to take adequate precautions for the safety of those who work for him. This is necessary as much in the interests of the good employer as in the interests of the worker.

A. Russell-Jones.

PUBLIC SERVICE BOARDS

THE semi-independent public board or commission has been greeted as a great discovery of the inter-war period. There can be no doubt of the tendency to resort to it for an increasing number of purposes, some of which are less apparently legitimate than others. Because it enshrines something of a compromise between private enterprise and State control this invention is apt to commend itself as a practical meeting ground between conservative and progressive. Many will perhaps be found to agree with Lord Reith, who looks forward to its extended use in the future. They would be wise, however, to pause and consider how solid are the foundations upon which they built their hopes.

For there is some danger of over-emphasising the newness of this instrument of administration, and so forgetting the lessons of similar experiments in the past. On the extent to which the Public Service Board expresses a useful discovery in political science, or can claim to be based upon acceptable principles, those who have given most attention to its study are not altogether agreed. Dr. W. A. Robson has described this as "the most important innovation in political organisation and constitutional practice which has taken place in this country during the past twenty years."[1] But as Mr. T. H. O'Brien remarks, after examining the establishment and operation of the B.B.C., the Central Electricity Board and the London Passenger Transport Board, in each case the form taken by these semi-autonomous corporations "was due more to accident and

[1] W. A. Robson (editor), *Public Enterprise* (1937), p. 359.

the spirit of compromise than to any general Parliamentary faith in, or appreciation of the working nature of, this type of institution."[2]

It is important to ask what in fact is new, and what of value, in this development. The creation of Boards or Commissions for administrative functions is by no means confined to the inter-war period. The history of the last century and a half is peopled by the ghosts of departed Boards, and the Commission was a method of administration used in Tudor times. A student of more recent history might justly claim that the Board or Commission is merely the initial stage in the development of a State function eventually to be organised in a ministerial department. Nor is it always easy to distinguish between a board and a ministry. While the Board of Health and the Poor Law Commission, to take only two examples, were to develop into a State department with a ministerial head, some ministries have the form of Boards without the substance, and others the substance without the name. The fictitious Board of Trade, Board of Education and Local Government Board are, or were, Ministries pure and simple. "My Lords of the Treasury" are a not much nearer approximation to a ministerial board. The Board of Admiralty is in fact as well as in name a ministerial board, and the other two Service departments show advanced symptoms of such a character. Within this field clearly the essential point is that the Minister, however his principal advisers may be formally co-ordinated, is wholly and entirely responsible for every act of his department. Here also it may be said that, despite attempts to the contrary, the whole tendency of British political organisation has been towards acceptance of the principle of his all-embracing responsibility. If this is true of general administrative functions, however, it would seem that there are quasi-judicial or trustee functions on the one hand and regional operations on the other, for which a semi-autonomous Board or Commission has proved a more enduring experiment. The Charity and Ecclesiastical Commissions illustrate the former type, and the Mersey Docks and Harbour Board and the Port of London Authority the latter.

How, then, is it possible to define the Public Boards which Dr. Robson and so many others welcome? Probably the clue to the effort to treat these as a mechanism wholly different from anything which has gone before is to be found rather in their origin than their functions. The three Public Utility Boards so far mentioned as established between 1926 and 1933 are all examples of a service taken over from private enterprise by the State. But a definition by reference to historic origin is unsuitable for a functional classification of actual political organisation. An alternative claim that they are essentially distinct might be based upon the type of function with which they deal. An attempt has sometimes been made to regard them as dealing with economic services, in contrast with social services such as are controlled by, for example, the Ministry of Health, the Board of Education, and local authorities. This again seems inadequate; and this kind of distinction is not easy to make. How is it possible to distinguish in such a categorical manner the services supplied by the Education Authorities and the B.B.C., or the Post Office and the Central Electricity Board? Can the organ responsible for supplying road transport services within a given area be thus categorically contrasted with the organ whose task it is to see that the roads used by such transport are created or maintained? It is only necessary to point out that nationalisation

[2] T. H. O'Brien, *British Experiments in Public Ownership and Control* (1937), p. 293.

of the roads at a different stage, or a development of Mr. Lloyd George's Road Board into a continuing authority distinct from the Ministry of Transport which absorbed it, might have presented us with an "economic service" in the form of through motor roads under such an authority, from special payment for which it might have derived its revenue, in order to see how great is the similarity between any functions that can be performed by State mechanism. If education be a social service when supplied by public authority, is it an economic service when provided by private persons on the basis of fees or profits—and similarly with medical services?

It is not, then, by reason of its origin or of the type of service which it provides that the Public Utility Board can readily be regarded as belonging to a distinct category, although its use may be most suited to a particular kind of service originating by process of socialisation. Its claim to peculiar treatment derives rather from its intermediate position between independence and complete answerability through a Minister to Parliament. If it be a species of its own it owes this fact to the attempt which it embodies but by no means always achieves to combine freedom in day-to-day operation with subordination in general policy, insulation from detailed public inquiry with ultimate responsibility to the public, and financial autonomy so far as the Treasury is concerned with regulation of its financial framework by statutory provision or ministerial order. Its personnel and staff are not part of the Civil Service, but they are in fact public employees, and the pay and appointment of some are determined by outside authority. The allocation of its revenues—between, for instance, the interests of staff in improved pay, consumers in better service, and the State or previous owners—is only partially determined by itself and partly by legislative, ministerial or quasi-judicial decision. But in none of these cases is the line of demarcation between independence and public accountability easy to draw. The point, for the purpose of definition, is that an attempt has been made to draw it. Whether success in this attempt is possible or desirable is a matter to be dealt with later. The fact that the attempt was made is evidence only that powerful enough persons accepted the need for it. It does not prove they were right, or that if right at the time the method they adopted had more than temporary value. And since the experiment of removing a specialised service from full Parliamentary control is not so new as has been claimed and has in the past proved both short-lived and unsuccessful, we are bound to consider whether any new conditions have arisen to make the lessons of the past lose any of their validity. That must be one of our purposes here.

It must be remarked at once that the idea that this semi-autonomous public service board is an invention of special value has grown up only after the institution of several such authorities. Each of these was in its origin an empirical answer to the needs of a particular situation as seen at a given period. They were not the application of an accepted theory, but a compromise between conflicting principles either of which had proved workable in isolation, but which were not necessarily workable in combination. Nor is there much evidence that the principles which ought to govern their constitution, operation, and connection with the established authorities of the State were given co-ordinated thought. Clearly they raise a whole series of problems, some new and some already met and dealt with in the older departments of State service. To answer the question how far they constitute a useful innovation it is essential to consider the purposes for which they were given their distinctive form,

the reasons behind those purposes, and the general question of how far these themselves can be justified.

Analysis of the reasons for setting up such semi-independent bodies would seem to require their classification into four types, regional, judicial, trustee, and administrative or managerial of a national service. The most obvious examples of the first category are the many Port Authorities, those for Liverpool and London being outstanding examples. Such bodies as these in fact bring us on to the fringe of local government. Historically it is this regional character which originally made possible their distinctive feature: that the elected representatives of a compact body of locally organised consumers compose them. Just as it was the fact that the interest of these consumers was broadly compatible with the public advantage which enabled them to survive without any greater degree of public accountability.[3] While the Mersey Board lacks constitutional links with the local government bodies of its area, and the Port of London Authority contains three appointees of the L.C.C. and two of the City Corporation, neither is responsible to local authorities and electorates. Both, however, combine two principal elements—the direct consumers, or users of dock facilities, and the department of the central government concerned with national transport policy. Although the Minister has a small minority of appointees on each Board, it is not accountable to him for its policy, nor is he seriously accountable for its policy to Parliament, nor does he give it directions. True, he has numerous limiting powers, may receive from it a regular report, appoint its auditors, or fix maximum charges, but he is not even responsible for seeing that it fulfils its statutory obligations. Clearly, both London and Liverpool are ports whose significance is national rather than local, and although the area within which these two authorities exercise jurisdiction is local and restricted, the service which they provide belongs even more definitely to the field of national policy than to the interests of the immediate locality. As must be seen from these examples the line between regional and national is difficult to draw, however, and this became peculiarly apparent in the case of the placing under public control of London's transport system. The principle applied to the two Port Authorities was to be applied in this case also, but the absence of a compact body of consumers made necessary a different method of composing the board and therefore of organising its public responsibility. Not the local but the central government was, here too, to be given the responsibility of what little outside supervision was decided upon. Indeed, the intention of the then Minister of Transport, Mr. Herbert Morrison, was to make the Board established for management of London's transport consist solely of men appointed by the Minister himself. It would thus have corresponded to the small group of ministerial nominees, which forms a part of each of these two Port Authorities.

It is instructive to notice that the question whether London's socialised transport service should be placed under a local or regional authority, on the one hand, or under a ministerial department, on the other, or whether it should be given some different kind of controlling body, was actively present in Mr. Morrison's mind. He gives as his reason for rejecting the first two possibilities an argument which springs mainly from the regional characteristics of the problem.[4] His case is threefold. A State

[3] L. Gordon, *The Public Corporation in Great Britain* (1938), p. 11.
[4] H. Morrison, *Socialisation and Transport* (1933), p. 149.

department, he argues, should not conduct a local service, even that of the metropolis. In this connection he does not attempt to deal with the question whether such a view applies also to the Metropolitan police, who are placed under the direct control of the Home Secretary. Secondly, municipalisation was considered impracticable because of the absence of a single suitable local authority for the London area. Thirdly, to establish a joint authority out of London's 168 separate local authorities would, it was thought, be neither democratic nor efficient. Mr. O'Brien is no doubt right in thinking that London transport has "a status of more than regional significance."[5] But it looks, from Mr. Morrison's argument, as though the regional character of this particular service was an important factor in determining the type of authority under which it was placed. Mr. Morrison was careful to add, however, that the organisation upon which he decided "must not be regarded as a pattern to be applied uniformly to all industries and services,"[6] although the Labour Party at one time committed itself to providing a similar body for the control of a nationalised transport service for the country as a whole.

The second type of semi-independent body is marked by quasi-judicial functions. An early example was the Civil Service Commission of 1855. The reason for removing this from Parliamentary control and ministerial accountability was definitely the view that it must administer State patronage in a strictly judicial frame of mind without the possibility of political interference. Here, of course, the limits of this freedom were determined by statutory provision, Order in Council and Treasury regulation. For these functions Ministers were answerable to Parliament, but not for the actual adjudication between candidates for office. The Commissioners, as indeed with all the other cases of these quasi-judicial bodies, were appointed by the Crown, the appointment being therefore a responsible one, to be defended if necessary in Parliament.

During this century there have been many further cases of such semi-independent quasi-judicial boards or commissions. Both the University Grants Committee and the Development Commission were, in effect, given the function of adjudicating between rival claims upon a Parliamentary grant of money for specified general purposes, however much they may have been given apparently advisory status. So were such other bodies as the Dyestuffs Advisory Licensing Committee, the Cotton Industry Board and Advisory Committee, as well as the Import Duties Advisory Committee.[7] The task also of the Electricity Commission set up in 1919, being mainly of a licensing and supervising character, without administrative or managerial characteristics, can be reasonably regarded as quasi-judicial. In that they are mainly price-fixing authorities, even though they are exclusively representative of the interests of producers, the marketing boards are not dissimilar in their broad general purpose. The Area Traffic Commissions, whose chairmen are appointed and removable by the Minister of Transport, and whose task is to regulate by a licensing system the motor bus services of the country, seem to belong to the same category; although they work under the general directions of the Minister, he does not answer for their particular actions in Parliament. The Coal Mines Re-organisation Commission, also established in 1930, has a function which resembles that of these other bodies in its

[5] O'Brien, *op. cit.*, p. 16.
[6] Morrison, *op. cit.*, p. 137.
[7] See Vernon and Mansergh, *Advisory Bodies* (1940).

mixture of judicial and administrative work. Having to recommend pit amalgamations, with certain compulsory powers, it has to hear the cases of interested parties and adjudicate between them. Its members were to be appointed by the President of the Board of Trade, the Chairman receiving a salary paid for under the vote of that department.

The third type of function for which the semi-independent Board was thought to be suitable was that of trusteeship, or the management of property on behalf of others. The Charity Commission and the Estates Committee of the Ecclesiastical Commission are cases in point. They must operate within a framework set by the law. In their operations they appear to be independent of ministerial direction, although appointments are made by Ministers. It is significant that in both cases, there being no Minister accountable to Parliament for their activities, provision was made for membership by a Member of Parliament, whose duties would include the answering of questions in Parliament about their operations. The Forestry Commission of 1919 was established on this analogy.[8] It purchases, owns and develops property on behalf of the public. It uses for these purposes grants provided by the Treasury, but it does not appear to be answerable through the Chancellor of the Exchequer for the way in which it carries out these tasks. Whether or not the management of land for the purpose of producing a commodity like timber can be properly regarded as more the function of a trustee than of commercial management may be open to question, but the holding and development of property by a body combining trustee and technical qualifications seems to have been the governing purpose in those responsible for establishing this Commission. Here, too, provision was made for inclusion within the Commission of a Member of Parliament able to answer for the activities of himself and his colleagues.

The fourth category has been described as administrative or managerial. The argument in this case for insulating the control of a function from political interference by the organs of the central government is not supported by any of the peculiar conditions attaching to the first three categories. The service is not regional but national, and therefore there is no ground for regarding the central authority as concerned only secondarily with a local body. Its primary function is not to hold property on behalf of someone else, but to provide a national service. Its first task is not to adjudicate between competing interests but to supply and develop a particular commodity or service. Thus the argument for "keeping politics out" has not behind it the accumulated evidence applicable in these other categories. It needs, therefore, a rather specially careful analysis.

The forces motivating this type of administrative experiment are curiously opposite, as are the reasons—largely of mutual suspicion—which engendered it. It has been promoted both by business interests suspicious of State departments and by Labour anxious to end competitive disorder without producing capitalist monopoly. It represents the marriage of the orthodox economist's preference for freedom of enterprise with the socialist's desire for services planned by public authority. There is thus embodied in it a compromise between the notion that the hope of personal profit alone ensures efficiency and the belief that efficiency can be secured by full responsibility to the representatives of the public in Parliament on the part of the controllers of a socially owned service. In the inter-war

[8] J. Parker, Ch. III, in Robson's *Public Enterprise*.

period the strongest force was the dislike by business men, and of course by their spokesmen in both Houses of Parliament, of Government "interference" in industry. They were convinced—and war-time experience had lent them evidence, derived from emergency conditions, which could be construed into conclusions of general application—that the civil servant could not compete in efficiency with the business man, and that a Government department was by definition inferior in practical ability if not in public spirit to a commercial firm. This was reinforced by fears and dislikes on the official side. A civil servant, and still more a business man turned temporary civil servant who is less versed in the principles of the British constitution, is apt to be impatient of Parliamentary criticism and of the right of the M.P. to question his actions. A Minister, particularly if he is weak or is faced by embittered opposition, welcomes an excuse for freeing himself from the need to undergo such cross-examination. It requires a specially strong awareness of the constitutional proprieties to survive the temptation of escape from Parliamentary supervision, and this is all the more so when that escape is offered by interests strongly entrenched in Parliament itself.

Both Minister and permanent official are on firmer ground when they argue that a public service ought to be freed from lobbying by interests —by no means excluding business interests—in and around Parliament. Mr. Morrison voiced this sensitiveness to outside influences in putting among his reasons for not having a department to run a transport service that its "management should be sufficiently free from those undesirable pressures associated with both public and private Parliamentary strategy, political lobbying, and electoral 'blackmail.' Subject to whatever Ministerial or other checks or appeals may be provided in the public interest, the management must be a responsible management and must be able to stand its ground in the interests of the undertaking which is committed to its charge. If the iron and steel manufacturers want an uneconomic freight for the transport of iron and steel, it would be disastrous for them to be able to frighten the management with the prospect of Parliamentary pressure promoted by the M.P.s representing the iron and steel constituencies. Similar considerations arise as regards political or electoral pressure from other powerful industries, sections of the travelling public, or from the large body of people employed by the transport undertaking."[9] Here, certainly, Mr. Morrison is on better ground. No one would dispute his assertion that such independence of interested pressures is essential. But what is not so evident in this argument is why a public board lacking the strength given by a Ministerial spokesman should be any abler to resist such pressures than a body with a Ministerial chief and the Cabinet to support it. For the moment, however, let it suffice that this was one of the more important arguments used for avoiding the organisation of such a new service in the well-tried form of the Ministerial department.

Apart from this argument, which starts from the common ground that it is necessary to avoid or circumvent "undesirable pressures," the reasons given for preferring a semi-independent public corporation to a ministerial department centre upon alleged deficiencies in the three public institutions constitutionally involved—Parliament, the Minister, and the organisation of the Civil Service. Of these the last is by far the most important, and perhaps the only valid one. Each needs to be stated, and then examined.

It is instructive to notice that the case which appears to have most

[9] Morrison, *op. cit.*, pp. 137–8.

substance is never made. This may be because if it were established it would prove only the desirability of the board as a temporary expedient for a definitely limited incubation period. Certainly it would seem that the most difficult stage in the development of a new public service is its first few years, while its guiding principles are being enunciated and before any basic routine has had time to be established. At such a stage the right of Parliamentary inquest on details might be converted into an instrument for the embittered hostility of defeated critics or of dispossessed interests. Such an abuse of Parliamentary functions might even lead to a reversal of policy before the new organisation had been given a fair trial. For these reasons Parliament might be wise to make a self-denying ordinance, or to protect its new creation from its interference, for a limited number of years. This is in fact what has happened, although unintentionally, in many cases from the Poor Law Commissioners and the Board of Health of a century ago to Mr. Lloyd George's National Insurance Commissions and Road Board.

Impatience with Parliamentary criticism, and more especially with questions, seems to have become more marked in recent years. A deepening of the differences between parties may be responsible for this. The premises from which the question springs are less likely to be the same as those which operate in the administrator's mind since the coming into the House of Commons of working-class Members, whose background and ideas have on the whole been radically different from those of the administrative-grade official. The natural consequences of this might also be expected to be the feeling that the Parliamentary supervision which it represents could better be dispensed with.

At the same time administration has become more technical and complex, and therefore more difficult for the average M.P. to understand. So, too, his inquiries and criticisms are apt to appear, and often to be, somewhat irrelevant. Inasmuch as this is the case it means that Parliament has failed to keep pace with the greater expertise required for governing the modern State. Its failure so far to adopt the only remedy, a specialisation of its own Members in functional committees upon which to devolve some of its supervisory duties, may in that case have served to strengthen this source of impatience. Certainly the ill-informed nature of some of its criticisms has furnished a not infrequently used argument for removing specialised State functions from its detailed supervision.

Indeed, as an alternative to the semi-independent board there was under discussion for a decade the devolution, from Parliament to regional assemblies or to an economic lower chamber, of most of the new functions added to the State in the last hundred years. If such proposals as those made by the Webbs or that discussed by the 1920 Conference on Devolution[10] belong in some measure to the era of home rule controversy, they also relate to the criticism of an omni-competent Parliament upon which it was thought too many and diverse tasks were being imposed. They thus provide another part of the background from which was to emerge the alternative experiment of delegating responsibilities to public boards.

A part of this fear that the normal organs of central government were being overcharged with burdensome duties is the belief that the Cabinet Minister cannot cope with yet more administrative functions. It has been asserted by Mr. Morrison that to organise new socialised services in a

[10] *Conference on Devolution, Report*, Cmd. 692 of 1920; Webb, *Socialist Commonwealth of Great Britain.*

department under a Minister would cause him "to be immersed in a large amount of detail connected with the management of industries," and that it would then "be physically impossible" for him to give adequate time to further measures of policy.[11]

On the other hand, it seems from Mr. Morrison's own experience with the socialising of one service that the negotiation and legislation necessary for placing private enterprises under a public utility board are a more complicated and protracted job than the taking over by a departmental Minister. Moreover, it is after all just at this stage, the taking over of a service, that the most tendentious criticism is likely to be made and the greatest amount of time to be required for dealing with difficulties of detail. It might well be said that at no moment after a public utility service has once been established is the case on these grounds for insulating it from public criticism as strong as just before it has been established. But no one has suggested such insulation during this early stage because it is too obviously then a part of the proper sphere of Parliament. From the experience of nationalising London transport the generalisation is fully justified that "under present conditions of political belief and Parliamentary procedure, the conversion of a major industry or service from private or partly-private ownership to public ownership under the form of management with which this study is concerned is a process which arouses great disagreement and involves large expenditure of public time and money."[12] This applies to the naturally complicated task of organising a new system of control. But when we turn to the subsequent problem of day-to-day working, it does not appear that the matters of policy interesting to Parliament, because causing public controversy, have been of any frequency of occurrence in the case of London transport. Therefore it seems reasonable to suppose that the increased burden falling on the Minister, had full responsibility lain with him for ordinary operation, as distinct from taking over, would not have corresponded to Mr. Morrison's fears. Assuredly, the Minister ought not to immerse himself in details, and if his department is properly organised he need not be placed in that position.

But it is even more to deficiencies in the departmental civil service that the need for a different method of organising new services is attributed. Here we are at the crux of the case. Mr. Morrison sums it up: such a new organisation ought, he says, to be live and adaptable; it should be free from Treasury control in such matters as the payment of salaries and wages. The essence of this line of argument is the view that the framework of the Civil Service, good though it may be for the administrative functions for which it was constructed, is unsuited to the needs of public utility services. An administrative department, it is thought, is different in its organisation, needs and methods from something which is nearer to a commercial undertaking, and the Civil Service system has not shown itself well adapted to perform these less routine and more experimental functions now undertaken increasingly by the modern State. The civil servant is not trained, nor does he work, in the more lively ways of business. It would be unwise to impose upon him tasks which require such ways.

Here, then, is a meeting-ground for several different lines of criticism which are only too apt to be confused. The frailties of officialdom have furnished a target for ridicule since officials existed, and it may be hoped

[11] Morrison, *op. cit.*, p. 140, and Mrs. Webb, *Political Quarterly*, 1931.
[12] O'Brien, *op. cit.*, p. 220.

that they will be no more spared in the future than in the past. The "circumlocution office" crystallises a popular belief in the less worthy characteristics of the jack-in-office. But he is not going to be cured of them by calling him the servant of a public board instead of a civil servant, and removing him from those checks and controls aimed at correcting his worst tendencies. It is not without point to remember, too, that historically the "circumlocution office" belongs to the period before the major civil service reforms had brought about a co-ordination and rationalisation of the many distinct departments, boards and other authorities, which it might seem to be the modern tendency to recreate.

Essentially the accusations of red tape and bureaucracy provide the gravamen of the charge against the Civil Service. While there may be some validity in the former it has been exaggerated by the natural impatience of those who do not understand the necessary complications of large-scale organisation or what is inherent in the need of public accountability. The business man who in his own concerns has been accustomed to be a law to himself dislikes having to answer to the public, and lacks the habit of reasoned explanation or the referring of practice to principle there necessary. The requirement to do this he regards as an unnecessary complication or red tape. His case is greatly strengthened by the hierarchical structure of the Civil Service which tends to concentrate the power of taking decisions too high up, to promote reference upwards, and to discourage delegation of authority. The charge of bureaucracy is not altogether relevant here, since it is mainly an assertion that the official is arrogating to himself powers properly exercised by others, such as Parliament or the Courts. It is also, in any case, based on misconceptions.[13] But by serving to strengthen the antipathy for the ordinary departments it no doubt militated against any tendency to give new duties to these, or to devolve upon the general type of civil service organisation additional opportunities of interfering with their masters, the public. To this may well be finally added a traceable distrust of the higher grades of the public service on the part of Labour. This became appreciable in the inter-war period. It is attributable to the knowledge that the social origin of the higher officials marks them off from Labour, and the suspicion that they are out of sympathy with the working-class or with progressive views. Whether it is right or wrong, grounds for that suspicion have also been provided from the Civil Service side in, for instance, Sir Henry Wilson's *Diaries* and H. Dale's *Higher Civil Service*.

The most important single cause of the flight from the ordinary department to the semi-independent public board is generally the least stressed and the most imperfectly understood. It is the working within the Civil Service of Treasury control. The basic, and at the same time the soundest, reason for establishing such bodies is not that they may be freed from public accountability, ministerial directive, or political interference, but from "the dead hand of the Treasury" as it actually operates. It is thus the failure of the higher direction of the public administration to adapt itself to changing and expanding needs that is mainly responsible. For it is illegitimate to assume that the actual methods of Treasury control are the only possible ones, although that is in fact what is normally done.

Criticism of Treasury methods goes far back historically. It is significant that early expression of it is to be found in relation to what is essentially a different form of department, an economic service, namely the Post Office.

[13] Cf. *Report of the Committee on Ministers' Powers, Cmd.* 4060 of 1932.

We find the grounds for it in the experience of Trollope as a Post Office official at the time when that service was rapidly expanding. From him, although he did not intend it in this light, we get the picture of a department called upon to determine the regulation of a service the great possible expansion of which it scarcely understood, and exercising this control derived from its financial responsibility in a narrow way inimical in fact to the very financial interest of which it was guardian, and which it was seeking to serve. "We were bound down," Trollope wrote, "by a salutary law as to expense, which came from our masters at the Treasury. We were not allowed to establish any messenger's walk in which a sufficient number of letters would not be delivered to pay the man's wages, counted at a halfpenny a letter. But, then," he added, "the counting was in our own hands."[14] In short, this "salutary law" could not be applied; it was unrealistic in conception and in the means of its application, and yet it represented a valiant effort of the Treasury to do a job for which it was not well fitted.

In the development of the Civil Service since Trollope's day there has been a striking uniformity of opinion about the working of Treasury control, that it is narrow or meticulous on financial detail and uncomprehending in bigger matters. That there has been no adequate resolution of the conflict between two definitions of the Treasury may account for this. Either it is a ministry concerned only with finance, or it is a department of departments charged with responsibility for the organisation and methods of all of them and therefore required, not to determine their policy, but to understand it, and to be able to grasp its full implications upon the administration of the department's business. The forces of separatism have encouraged the narrower interpretation of its functions in the Treasury. The Civil Service is not a single service like any of the armed services. It has been able to resist many of the tendencies towards unification because each separate department, jealous of its own authority, has a Cabinet Minister at its head to defend its claims on an equal footing with the head of the Treasury. The Treasury has therefore fluctuated between the assertion of an over-riding authority and the retreat from responsibility for anything but the most pedestrian financial supervision. Except in its special relationship to the Civil Service Commission and to such matters as general grading of officials and recruitment, it is on the whole the humbler interpretation of its function which has prevailed. That this was so, but that it should not be so, has been explicit or implicit in the findings of the MacDonnell Commission, the Tomlin Commission and the Select Committee on National Expenditure of 1942, as well as of the Haldane Committee of 1918. But this is not the place to attempt to deal with the larger issue of Treasury control; it must suffice here to say that if this has fallen down when directed towards the ordinary departments of administration, a failure for which the Treasury itself is by no means wholly to blame, all the more are its defects likely to be found where it is not an administrative department but the more complex problems of a productive service with which the Treasury has to deal. "There is no commercial house in England that would shew a profit at the end of the year if it were subjected to the kind of control which the Treasury exercises"; this was the view of a business man recruited to the Government service during the first great war.[15] And it was this kind

[14] A. Trollope, *Autobiography* (World's Classics edn.), p. 81.
[15] Sir S. Demetriadi, *A Reform for the Civil Service* (1921).

of consideration, more than any other, which dictated the policy of placing public utility services under an authority removed from what was thought to be the Treasury's peculiar combination of hampering, and at the same time ineffectual, jurisdiction.

That there is justification for such a view is strikingly confirmed by the experience of the Post Office in the inter-war period. In this case a decade of public criticism led to the appointment of the Bridgeman Committee. This body, be it remarked, was politically conservative and representative of high finance and big business. Its findings are all the more significant both for this reason, and because they come at a time when deficiencies in the State postal and telephone services were being constantly used by anti-socialist politicians and business men to prove the necessary commercial inefficiency of the State. They divide conveniently, for our purposes here, into three subjects.

First, the Committee examined and completely rejected the case for placing the Post Office under a semi-independent public board. "We are by no means satisfied that the management of the service in question by such a body would infallibly result in the disappearance of the defects to which we have alluded, while it might be withdrawn too much from the wholesome operation of public criticism."[16] Moreover, on this allegation of "political interference" in matters belonging to business management, it found that the argument relating to the "supposed results of Parliamentary intervention in matters of detail is somewhat unduly stressed and that, in the long run, the advantages of the power of Parliamentary intervention outweigh its disadvantages."[17] But, while the Committee thus aligned itself against the critics of full public accountability, it both attributed the admitted Post Office inefficiencies to actual civil service organisation and saw the possibility of remedying them by improvement in that organisation rather than in departure from it.

Thus the second subject of the Committee's findings related to finance. Not Parliamentary control but the relation of the department to the Exchequer and its internal organisation under Treasury control were held responsible for its failures. The former of these two main obstacles to efficiency was the absence of self-contained finance. No picture of the real financial position was shown by the method of presenting accounts, which was on a purely cash-transaction basis. Accounts did not reveal revenue earned as distinct from revenue received, or liabilities incurred as distinct from liabilities met. An important part of Post Office payments was borne not on the Post Office vote but on votes for the Office of Works, the Stationery Office and rate contributions. And the so-called "Post Office Net Receipt" then went to the Treasury for the relief of taxation, the size of this having no effect on the amount of money available for expansion or improvement, and there being therefore small incentive to efficiency. All expenditures required Treasury consent but "in some cases the obtaining of Treasury approval is very largely formal and relates to matters on which the Treasury are not in a position to exercise much more than an academic criticism."[18] Incidentally it may be noticed that in this finding the Committee was echoing the words used by the MacDonnell Commission which spoke of Treasury approval as "in reality formal" when this was exercised over the Road Board.[19] The Bridgeman

[16] *Report on the Post Office*, Cmd. 4149 of 1931–2, p. 54.
[17] *Ibid.*, p. 55.
[18] *Ibid.*, p. 58.
[19] Cmd. 7338 of 1914 (4th Report), pp. 76–7.

Committee therefore made two recommendations: that the accounts should be rendered in a more realistic and businesslike form and separated from the finances of other departments; that the annual surplus shewn on such an account should be used to supply a basic contribution of a fixed amount to the Exchequer, the excess being returnable to the Post Office for its own other than current needs.

Thirdly, the Committee criticised certain aspects of the internal organisation of the office. It particularly condemned the undue rigidity of grading, the "autocratic isolation of the Secretariat in relation to the Engineering and Accountant-General's departments and the narrow and specialised meaning attached to the word 'Administrative.'" It was also critical of the failure to give to higher officials a personal experience of the work of the lower officials from the bottom upwards and their "absence of touch with the work in this field."[20] "As a result of the recommendations of the Bridgeman Committee, the Post Office secretariat has now been reorganised in the form of a functional board. . . . The director-general is no longer in a position of isolated splendour, but is now considered as *primus inter pares*. Periodical meetings between him and the heads of the various departments who constitute the other members of the board, with the Postmaster-General in the chair, have been substituted for the old system, with a marked improvement in the spirit of the organisation."[21] But the Minister retains full final responsibility.

Since the reforms which followed the Bridgeman report the Post Office has enjoyed a decade of progress. Hostility to it has faded away. Criticism has given place to praise. And this marked change has occurred without any interference with the cardinal principles of the administrative department—full ministerial responsibility to Parliament, general Treasury control, and staff recruitment and grading under the combined authority of the Civil Service Commission and the Treasury.

The Post Office is comparable with at least some of those services recently organised under semi-autonomous boards. It was quite properly acclaimed as such by advocates of the latter in the days when it was under a cloud. They cannot resist the conclusion, therefore, that if solution of its difficulties has proved compatible with the departmental form of organisation in this case, it may be also in the case of other services. Study of the Post Office has suggested three conclusions in this connection. The first is that its troubles were due to certain defects in the general structure of Civil Service departments which may have become more apparent in a monopoly service than in an administrative office. The second is that these defects are remediable. Thirdly, it has shown the need for much further thought about the administrative considerations involved in establishing public services and about the requirements for securing their efficient management. If it has been implied that the Treasury has failed to work these out, so it may be added has everyone else from Government, Parliament, and such a Royal Commission as the Tomlin Commission to the public lawyer and the student of public administration.

It is impossible here to do more than indicate, beyond those already suggested, what seem to be some of those considerations and requirements, with special reference to the often greatly varying practices existing.

The first and most important—because it is upon this that all hinge—is the need for full responsibility to the public, or making the service

[20] *Post Office Report*, pp. 99–100.
[21] Robson, *op. cit.*, pp. 295–6.

what its name implies—a public service. There can be no doubt of the "extraordinary lengths to which the principle of autonomy has been carried" in organising British, as distinct from continental, public corporations.[22] The B.B.C.'s Board of Governors, to take one example, is accountable to nobody for the way it appoints, pays, promotes or dismisses its staff. An advocate of its independence in such respects admits that "its attitude of aloofness, and apparent unwillingness to admit the right of Parliament to criticise its internal management, has naturally not recommended itself to the representatives of the people assembled at Westminster, and an atmosphere of mutual suspicion . . . has been allowed to grow up."[23] The Ullswater Report went some way to admitting the need for a closer link and fuller responsibility,[24] although it wished to maintain the principle of independence.

Responsibility, however, is a composite matter. Where limited, as with the public service boards, it has always proved difficult to determine the nature of the limits. That is indeed one of its most dangerous defects, for it is axiomatic that where responsibility is confused irresponsible action follows. Questions in Parliament have, for instance, been disallowed even where the Minister's authority was undoubted, as with the technical efficiency of the broadcasting service—a question on audibility in Scotland.[25] Where responsibility is divided as it is between the Minister and the Governors of the B.B.C. inquiry is more easily met by evasion. The Minister and a Governor who happened to be also a Member of Parliament have even been known to disagree in the House of Commons as to their respective functions.[26] The Minister may have the right to withdraw or vary the liberties granted to a board and yet not be answerable for doing or failing to do so, or for the way in which they are exercised, as with the licence granted to the B.B.C. He may be responsible for "general policy," as with the B.B.C., and not for day-to-day operation. He may not be answerable either for operation or for the broad lines of policy, as with the L.P.T.B., even though he has certain prescribed powers such as to remove members of the board or make regulations for the conduct of certain of its business or the form of its reports. He may have power to examine its accounts and yet not be responsible to Parliament for presenting them or for the expenditure they reveal or for their contents, as with most boards. A distinction has even been drawn between the Minister answering in Parliament "for" a board, or "about" a board, the former being outside his responsibility and the latter being an act of grace prefaced by the absolving formula "I am informed by the Board that. . . ." One general conclusion is that the Minister is likely to have an influence upon a board considerably greater than his accountability to Parliament. It may be desirable to the board, for instance, that he should be willing to speak on its behalf. To do so he may impose terms. Acknowledged or unacknowledged consultation with him is therefore probable before policies are decided upon. He may thus exercise power without admitting responsibility, and the practical negation of independence follows.

Nor does the appointment of a Member of Parliament, other than a Minister, as in the case of the Forestry Commission, provide a satisfactory alternative. Since he has not the power belonging to a Minister of making

[22] Gordon, *op. cit.*, p. 7.
[23] O'Brien, *op. cit.*, p. 168.
[24] Cmd. 5091 of 1936.
[25] O'Brien, *op. cit.*, p. 156.
[26] See *Political Quarterly*, April 1942, pp. 190–1.

policy he cannot be held responsible for policy. The essential object is thus not attained.

It is safe to lay down certain principles. The Minister ought to appoint, or at least actively to accept, all members of any board within his jurisdiction, and to have the power to remove them. Otherwise he cannot be expected to accept responsibility for any of their actions. Nor should his power of removal be restricted any more for a member of a board than for a high civil servant. He must, in addition, be accountable for policy; and since policy is in practice indistinguishable from day-to-day operation, being in fact built up out of this, underlying it, almost imperceptibly changing with it, so must he be answerable for day-to-day operation. As in any case this is not likely to be a matter of controversy save where it raises questions of policy, the additional burden is correspondingly unlikely to be severe. Nor should he have any cause to fear the tiresomely petty M.P. for the latter very soon defeats his own purposes. Further, Parliament must have the opportunity of fully examining the affairs of any public service periodically, for it is a clear lesson of history that Parliament grows suspicious of what it cannot examine and renders impossible what it finds it cannot control. But that is to say that with regard to responsibility the public service should approximate to the Post Office rather than to the semi-autonomous board, and become a department rather than an independent corporation.

The second main requirement centres upon this notion of "independence of undesirable pressures." Necessary though this is in the interest of promoting initiative it is doubtful whether the semi-autonomous corporation is a real or durable means of ensuring it. The problem of preventing successful "pressure" is one of securing strong enough counter-pressure, for pressure will exist in any case, and it is hard to imagine how this could be better devised than in a Cabinet Minister supported by an incorruptible Civil Service. Pressure is not excluded by calling a board independent; on the contrary it is most likely to be found where secrecy is possible and accountability not clear. And it will most probably of all be successful where fear of hostility exists owing to the lack of a strong spokesman as public defender. Indeed the independence—and initiative—of a public concern is a function of the strength of its leadership, not of the amount of cotton-wool in which it is wrapped. If leadership is strong and so able to defend itself it will not fear questions or criticism; if weak, no insulation will long absorb public attack or Parliamentary hostility. While the best protection is efficiency, for that prevents attack, defence which cannot be stated in rational terms is apt to be indefensible. Moreover, if such details as the freight rates mentioned by Mr. Morrison are at issue, the Minister is no less able to resort to the quasi-judicial body like the Railway Rates Tribunal than is a public board. Finally it must be remarked of "undesirable pressures" that public opinion itself is a pressure, though a highly desirable one, and it is composed of many pressures of which the decision as to how far one or the other is desirable or undesirable is itself a matter of public policy.

The composition of the board raises acute problems, the more so the further its removal from ministerial control. Where as with the Post Office the higher direction is fully covered by Government responsibility such questions do not arise at all outside the ambit of Civil Service organisation. In the forming of a board, however, two not necessarily harmonious aims are to be found. The first is the body of public persons without

specialised knowledge of the business who are overseers rather than managers and whose function is to inspire confidence in the public, giving a lead to them and absorbing their criticisms and pressures. The second is the body of qualified managers and experts actively to direct from their own competence the conduct of the service. Some measure of representativeness can be combined with the first, as with the Port authorities and the Governors of the B.B.C., and the attempt has been made to combine it with the second in the C.E.B., where the Minister appoints "after consulting" certain interests, and in the L.P.T.B., where there is also provision for the inclusion of persons with local government experience. Policy has fluctuated; at one time its purpose appears as the reproduction in the board's composition of the public and general-managerial characteristics of the political and permanent heads of a department; at another, of the special or technical qualities of the expert and managerial controllers who are slightly lower down in the hierarchy either of business or of departments. Thus in regard to broadcasting the Sykes Committee, which thought in terms of "ultimate control" by a Minister, recommended that he be assisted by a Standing Committee or Broadcasting Board of thirteen persons nominated to represent interests. The later Crawford Committee, which had moved to the conception of a board not subject to ordinary ministerial control, wanted paid members of public character, "persons of judgment and independence . . . having no other interests to promote than those of the public service." As the actual practice has turned out, the Governors, though intended to be public figures, have seldom been of a kind to excite unusual public confidence or respect, however estimable in their private lives. Mr. J. H. Whitley and Mr. H. A. L. Fisher were exceptions in that they were more than names to the general public, very few of whom at any time would be able to say who was on the board, which observers seem on the whole agreed is "unreflective of the general outlook of the community."[27]

Where, on the other hand, the aim has been to appoint persons of specialist qualifications for active management, rather than of public eminence, it has been more consistently achieved. In the main this has been done by going to the ranks of the industry incorporated in the public service. At the outset this is not difficult but in the nature of things it cannot be long repeated, and the same problems of recruitment of managerial staff will face the public utility as face the comparable portions of the Civil Service. Solution of the one cannot be divorced from solution of the other. There are opportunities of mutual benefit from avoiding any attempt at closed and exclusive methods. It may even be that administrative grade, as well as specialist, recruitment and training may—with the elasticity which it is already showing itself to require in the older branches of State service—prove no less applicable in these newer forms. The danger of too great rigidity in the one may be countered by the danger of too little principle in the other, to the advantage of both.

The question of the representativeness of boards raises another important issue—the whole syndicalist claim for vocational self-government. It appeared especially at the time of the establishment of L.P.T.B. in the demand for labour delegates. No doubt the absence of a Parliamentary majority made resistance to this demand easier at the time, but it is likely to be heard again. If any "interests" are to be represented in the higher direction of such a service there can be no question that the body

[27] W. A. Robson, in *Political Quarterly*, December, 1935.

of those engaged in carrying it out have as good a claim as anyone. Thus it is not surprising to find that in the Port of London Authority, where two members (out of 28) are appointed by the Minister of Transport and the L.C.C., "after consultation with such organisations representative of labour as [they] think best qualified to advise them on the matter,"[28] labour has not been satisfied. On the contrary, the Transport and General Workers' Union has twice promoted Bills aimed at enlarging labour representation to equality with other interests.[29] The advantages of such representation can only be made compatible with the larger public interest where the overriding authority is in the hands of those who can speak for consumers and the general public.

This connects naturally with the further general problem of staffing. Criticisms have been at times bitterly directed against examples of autocratic methods. They are not unlikely to be heard again. There is always the danger of corruption and nepotism where public standards for appointment and promotion are not accepted. A tendency has already shown itself to move here towards the adoption of civil service methods. These have been evolved with much thought and care. Again there seems every reason why similar principles should be applied in all comparable branches of the public service. Full trade union freedom is but one of these, its expression in the Whitley Council another. The Civil Service, it must never be forgotten, contains and caters for large bodies of technicians and professional and industrial workers, more and not less varied than the staff of any single public utility—whether in the Post Office, ordnance factories, dockyards or elsewhere. It is an illusion that it consists mainly, even in peace-time, of clerks and officials. What has been done in this connection to establish proper standards of employment and public morality cannot be thrown away in the maintenance of the service of public boards, however much erstwhile captains of industry, now converted into State officials, may prefer freedom from the external imposition of accepted standards.

Conditions and requirements with regard to finance have been considered above. This is a problem which links naturally with that of co-ordinating public services. It is only possible here to point to the need for much further study. Where, for example, should lie the borders between "self-contained finance" and Treasury interference? What conditions ought to be attached to the raising of loans and new capital expenditure? What accounting, auditing, pricing and costing methods are appropriate and what co-ordinating authority should see to their regulation? How, and in accordance with what body determinant of policy, should allocation of grants or profits be made among different claimants? In the Soviet Union, for instance, we find a percentage allocation of surplus in one service laid down by authority—between such objects as the Commissariat of Public Finance, improving workers' living conditions, capital expansion, the bank of long-term credit for industry and electrification, technical education of workers, and an incentive fund—varying from 47 per cent to a quarter of one per cent. What has been done in this country recently in the Post Office surplus allocation is but an elementary beginning related more to conditions as they happened to be at the moment than to any wider view of policy. It is the working out of those wider views, not of course in any static form, by an appropriate

[28] Gordon, *op. cit.*, p. 29.
[29] *Ibid.*, p. 31.

but considerable development of some department of government, whether Ministry of Production or the Treasury, which is the need implicit in such questions. It implies, too, the need not for a narrow, pedestrian financial mastery, but for the use of the money measuring-rod by policy-making authority properly equipped with economic information and research services, and so able to look at all relevant facts and frame policy to meet them.

But to see the need for this as well as to enable it to be done a term must be set to the notion that independence or irresponsibility are worthy ends for those charged with the creation or maintenance of public services. We cannot do better than revert to the conclusions of successive reports, each pointing to the essential: integration at the level of Parliamentary and Ministerial accountability. "We regard with apprehension," said the MacDonnell Commission,[30] "the creation of any authority having large public funds at its disposal which is outside effective Ministerial control and Parliamentary criticism." "There should be no omission," reported the Haldane Machinery of Government Committee,[31] "in the case of any particular service, of those safeguards which Ministerial responsibility to Parliament alone provides." The Bridgeman Committee repeated:[32] "We consider that the public have a right to the influence which Parliamentary discussion and control alone can give." And these remarks are true of all such bodies, not excluding others not dealt with here—such as the British Council, the Unemployment Assistance Board, or the Forestry Commission—except only perhaps bodies of trustee or quasi-judicial function.

H. R. G. Greaves.

[30] *4th Report*, pp. 76–7.
[31] Cmd. 9230 of 1918, p. 11.
[32] Cmd. 4149 of 1931–2, para. 49.

A JOB FOR JURISPRUDENCE

IT is difficult to define jurisprudence since the professing experts have not themselves agreed on a definition; but broadly speaking, and begging all the questions which the experts like to fire at each other, it appears to be accepted that jurisprudence is the science of law. At any rate, you cannot have any jurisprudence until you have got some law to work on; and you cannot have any law until you have got some fairly well defined rules of conduct; and rules of conduct have no legal validity until you have evolved some machinery for enforcing them; and, finally, the machinery is of little use unless it is kept in constant and efficient running order. What strikes one about this catalogue is that the one and only item you can do without is jurisprudence. If you have once got a set of reasonably acceptable rules and a machinery for applying them which really works you do not need any jurisprudence.

The suggestion, I know, is that the mere mention of reasonably acceptable rules necessarily involves jurisprudence, and that it is the very function of jurists to evolve rules which will answer to that description. "Law," to quote Prof. C. K. Allen,[1] "is a body of interrelated principles, and jurisprudence is the systematic synthesis of them. . . . Law is too great and too complicated an instrument for blundering improvisation."

[1] *Legal Duties and Other Essays in Jurisprudence* (1931), p. 22.

To which I reply that this sounds very well in theory, but in practice things simply do not happen that way; a point which indeed is admitted by the same author when he says a few pages later[2] that "the manner in which our law has grown has not been encouraging to the pure science of extra-judicial jurisprudence, and on the other hand jurisprudence has done little to commend itself to the professional lawyer." I would admit that where you have a community which has got for the first time to be welded into a state and furnished with a constitution and a code of laws you can possibly begin at the theoretical end of the catalogue and work downwards. In the light of comparative jurisprudence you can select the sort of constitution and the sort of code which you think will be suitable for the community; then you can formulate the rules which will express these ideas in terms of law; then you can devise the machinery for applying the rules; and finally you can set the machinery in motion. It is perhaps not an entire flight of fancy to suppose that some such process was gone through in 1787 when the American Constitution was devised. But in a country like England you cannot do this. We have a constitution and a body of law which stretch back to the horizon of history. There is no question of rubbing them out and starting afresh; we have got them and have got to make the best of them, and it is only by improvisation that we can get along at all.

It may be argued, however, that it is not improvisation, as such, that is objected to, but only "blundering" improvisation, and that it is by the application of jurisprudence that blunders will be avoided. This again I deny; for so extraordinary and unexpected are the legal problems thrown up by advancing civilisation that no jurist ever born could be expected to foresee them. Take, for instance, the case of hire-purchase. Hardly practised at all as a method of doing business at the beginning of this century, its rapid and disconcerting development between the two wars was one of the most striking social phenomena of our time. Moreover, in the space of a few years it had given birth to two entirely distinct species of "racket," neither of which could reasonably have been foreseen by the most prophetic jurist of a previous generation. As a social problem hire-purchase quickly split into two branches—motor car hire-purchase and furniture hire-purchase—and between the two there was practically nothing in common except a legal theory which was inadequate to deal with either of them.

The fairy godmother of motor car hire-purchase was the Finance Company, and its evil genius was the Fraudulent Dealer. A customer wishes to buy a motor car, but cannot afford to pay for it except by instalments. A motor dealer wishes to sell him a car, but cannot afford to do business unless he is paid in full on delivery. This dilemma is resolved by finding someone who is willing to pay the full price to the dealer and to collect it (plus a small interest charge) by instalments from the customer. Hence the Finance Company, which emerged into prominence in the 1920's and thereafter dominated the scene. What the Company did, for all practical purposes, was to lend money to the dealer and get it back again with interest from the customer. What it did, in law, was to buy the motor car outright from the dealer and then let it out on hire-purchase to the customer. The Company, of course, was really dealing in money, not in motor cars. It never took delivery of the car from the dealer. On the contrary, it appointed the dealer its agent to deliver the car to

[2] *Ibid.*, p. 27.

the customer; and not merely to deliver the car, but to do everything else from beginning to end which an agent could do. Thus the dealer carried not only a stock of motor cars but also a stock of forms issued by the Company. When the customer came to buy a car he began, as a rule, by filling up a "proposal form," that is to say, a request to the Company to purchase the car from the dealer and let it out on hire-purchase to himself. If this proposal were accepted he would then sign a hire-purchase agreement expressed to be made between the Company and himself and, finally, a receipt addressed to the Company acknowledging that he had taken delivery of the car. All these forms were produced to him by the dealer, and they were frequently all signed at the same time with the dates left blank to be filled in later. In addition, he generally paid the initial deposit to the dealer, who received it as agent for the Company and subsequently retained it, in his character of vendor, as part of the purchase price paid by the Company to himself. The legal analysis of this transaction bore almost no recognisable relation to the actual facts. So far as the customer was concerned, the process of buying a car on hire-purchase consisted of going to a dealer, paying a deposit, signing three times on the dotted line and driving the car away. It seldom occurred to him that the Finance Company were the owners of the car. As for the Company, who were supposed to be buying it and letting it out, they never saw the car, nor wanted to; while the dealer, who was supposed to be selling it to the Company, considered himself to be merely borrowing money, and always spoke of the price he received as "an advance."

This curious, but highly convenient, system lent itself to the most extraordinary frauds. A dishonest dealer, who had possessed himself of the proposal forms of several Finance Companies, would often inform a customer who had filled up one of them that Company A had for some reason or other declined the deal. The customer therefore filled up another proposal form addressed to Company B, and later, perhaps, a third addressed to Company C, with whom he finally entered into a hire-purchase agreement. Meanwhile the dealer had obtained successive "advances" on the same motor car from each of the three companies. The companies could usually be kept quiet for a considerable time, and it was not until some months later that they discovered that they, and the customer, had all been swindled. This resulted in the most complicated litigation, the costs of which invariably exceeded the value of the car, and the principal sufferer from which was nearly always the unfortunate customer, who found himself pursued by two or more Finance Companies simultaneously. The most spectacular case which came my way at the Bar was one in which, although the customer had been induced to sign a receipt for a specified car (together with the other usual forms) and the dealer had duly obtained an "advance" on it from a Finance Company, the customer never got the car at all, for the good reason that no such car had ever existed except in the sales-talk of the dealer! Another feature of these transactions which became painfully evident was that the remedy against the goods provided by the contract, viz. retaking possession for non-payment of instalments, was very generally defeated by the extreme mobility of the motor car. The pursuit of the contractual remedy by the Finance Company often had much of the charm and uncertainty of a fox-hunt. Further legal conundrums of the most inscrutable character used to arise from the fact that all the documents were signed at the same time and when they came to be examined in Court were found to be

wrongly dated or never dated at all. Up to the outbreak of war no satisfactory solutions had been found for the social problems produced by this type of business. Presumably they are now in cold storage awaiting the revival of private motoring after the war.

But what has jurisprudence to say to all this? What solutions can be found by "the systematic synthesis of interrelated principles of law"? What solutions could ever have been prepared in advance by such a method? Let the expert jurist stand back to the year 1895 and consider, as the House of Lords then did, the essential nature of hire-purchase as it was then known. (See *McEntire* v. *Crossley* and *Helby* v. *Matthews* (1895), A.C. 457 and 471.) Could he then, if he had been consulted, have drawn out from the great reservoir of his academic knowledge any basic principles which would have anticipated the situations above described? Would he ever have contemplated the part which was to be played by the Finance Companies? Could he reasonably have foreseen the immense development of the internal combustion engine and the mass production of low horse-power cars? Could he possibly have imagined the curious spectacle of a bailor who had never yet seen, or wanted to see, his own property, and would have nowhere to put it if it were delivered to him, nevertheless employing agents to hunt for it from town to town and from car-park to car-park in the hope of being able to take possession of it at some moment when his defaulting bailee was not looking? Had he thought of these things, would he have regretted the decision of the House of Lords that a hire-purchase agreement was not registrable as a bill of sale? The Bills of Sale Acts were wide enough to catch anything written on paper if their lordships had so wished, and the opposite decision would probably have resulted in quite a different development of hire-purchase —though whether it would have turned out for better or for worse, who can tell? The fact is that nobody can tell. It is hard enough to be wise in law even after the event, and not all the jurisprudence in the world can make us wise, or even articulate, before it.

Furniture hire-purchase took quite a different course, and its own peculiar racket, known as the "snatch-back," is probably familiar to all. Essentially, it was a system for selling cheap furniture for about one-and-a-half times its proper price, and when allied, as it generally was, with hot salesmanship, it was irresistible. The salesman would call some time in the morning, after the wage-earner had left for his office or works, and have an agreeable chat with Mrs. Wage-earner, in the course of which he convinced her of her need for a new wireless set, vacuum-cleaner or grandfather clock and of the advantages of obtaining one for 5s. down and 2s. per week for the next eighteen months. Business followed almost instantly and delivery of the goods was always prompt. "Hire-purchase," said an extremely discerning County Court Judge, "seems to consist of being persuaded by a man whom you don't know to sign an agreement which you don't read to buy furniture which you don't want with money which you haven't got." The agreement, which was generally in minute print and of which the hirer rarely received a copy, provided (*inter alia*) that the moment any instalment fell in arrears the owner should have the right to retake possession of the goods and a licence to enter the hirer's premises for that purpose. Sooner or later the hirer was bound to default, if only by inadvertence; and when half or more of the total price had been paid the owner's man came and fetched the goods away again. Within a day or two they would be let out to another hirer on

the same terms. When this had been done three times the goods (if they had not already fallen to pieces) might reasonably be scrapped, since they had already earned about 150 per cent of their proper purchase price. According to the member who seconded the motion in the House of Commons for the second reading of the Hire-Purchase Bill of 1938, the number of snatch-backs taking place every day throughout the country at that time was about six hundred. This racket was firmly dealt with by the resulting Act; and here one may remark that this successful measure was essentially an improvisation which gained its effect simply by facing the fact that even the most elementary jurisprudence means nothing to the man in the street and by cocking a snook at the basic principles of contract. It forcibly inserted a number of express and implied terms into the hire-purchase agreement, whether the parties liked them or not; it made it a criminal offence for the hirer to refuse to tell the owner where the goods were; it deprived the owner of all his contractual remedies against the goods themselves after a certain number of instalments had been paid; and it gave the County Court power to rewrite the contract to suit the pocket of the hirer.

I have gone into this matter of hire-purchase at some length, since it shows how wide is the gulf between established legal principle and the social conditions of to-day—a gulf which is sometimes to be bridged, in defiance of logic and legal theory, by realistic improvisations, and at other times is not bridged at all. But it may be said (though I should not agree) that the field of hire-purchase is a small and exceptional one, which developed such a precocious and unexpected fertility under the manurial influence of mass production and modern salesmanship that the legal machinery to cope with its product could not be modernised in time. Very well then; let us look at some wider and more familiar fields which have been patiently cultivated through many legal generations. Let us look at the nature of liability in tort and, simultaneously, at the contract of insurance.

The essence of tortious liability has been stated in Holland *On Jurisprudence*[3] as follows: "Remedial rights are available, as a rule, '*in personam*,' i.e. against the wrong-doer, who, by the act of wrong-doing, becomes at once the ascertained person of incidence of the remedial right." Curiously enough, this author has little to say on the subject of insurance, which seems indeed to be largely neglected in the standard works on jurisprudence. Nevertheless, insurance in various forms has for long been an inherent feature of our social structure, and third-party motor vehicle insurance has now for some years been universal. Nor is it by any means a novel institution dating only from 1930, since a large proportion of motorists were already insured in this way before the Road Traffic Act made it compulsory for them to be so. The relation of insurer and insured had been well known for generations and, to practitioners at any rate, the relations of insurers *inter se* were not unfamiliar. They involved such devices as "knock-for-knock" agreements and re-insurance of liability beyond a certain margin, which often gave rise to a conflict of interest between insurer and insured. The ambiguous position of solicitors instructed by an insurance company to defend an action brought against its insured was emphasised by *Groom* v. *Crocker* (1939), 1 K.B. 194, where a motorist found that, as a result of negotiations between insurance companies and their solicitors, judgment had been given against

[3] 13th ed. (1924), p. 329.

him for £900 and costs in an action the hearing of which he knew nothing about. If it is sometimes difficult for a solicitor to remember whether it is the motorist or the insurer who is his client, it may be equally hard for a litigant who is insured to take his own liability seriously. Not long before the war a young man took his mother for a drive in his motor car and ran into a telegraph pole. The mother was rather badly injured, and was wisely advised to bring an action against her son, who was of course, insured. Although the insurers did their best to effect a settlement, no agreement was reached until the case was just about to come into Court. The mother's solicitors and the son's insurers then agreed that a payment of £750 damages would meet the case. All that was needed was the defendant's consent to submit to judgment for this sum. But he would have none of it. "What!" said he, "Fob my poor old mother off with £750? It's outrageous! I won't consider anything less than £1,000." So the action was tried. The judge agreed with the son and the old lady got her £1,000 after all. This result was no doubt very just; but the actual course of events in this (as in *Groom's*) case makes Holland's statement about "the person of incidence of the remedial right" look rather cock-eyed.

By way of final illustration, let us take a converse case: one in which an alteration of the law was made only after the subject in question had been explored and expounded by judges and academic experts over a long period of years. Anyone would have supposed that, after the *S.S. Amerika case* (1917), A.C. 38, and the spate of learned discussion which accompanied and succeeded it, the implications of the maxim "*actio personalis moritur cum persona*," must have been known or imagined *ad infinitum*. But not so. By the Law Reform (Miscellaneous Provisions) Act, 1934, this historic principle was in substance abolished—again only after its careful re-examination by a first-class committee of practising and theoretical experts. Which of them foresaw, and who can be blamed for not having foreseen, the decision in *Rose* v. *Ford* (1937), A.C. 826, and the fantastic development of the action for damages for loss of expectation of life, which within a few years had added to the rights of the citizen the right to be paid £1,000 if his baby was run over by a motor car? As it turned out, the harvest was short-lived, for soon after the outbreak of war the price of babies was reduced to £200 (*Benham* v. *Gambling* (1941), A.C. 157), at which figure it has presumably been pegged for the duration. Opinions may differ about the rights and wrongs of this matter, but no one can say that, as legal history, it is very edifying, or that it provides any occasion for jurisprudence to pat itself on the back.

The basic fallacy seems to me to reside in the elevation of jurisprudence to the status of a science, which argues, since law is the necessary raw material of jurisprudence, that law itself is, or ought to be, scientific also. But law is not a science at all. There is no analogy between the lawyer's study and the laboratory. Law does not discover new elements or principles, or put new instruments or knowledge at the service of humanity. Nor is it an art, producing new forms of beauty or sources of inspiration. A book of law may be consulted, as one consults Bradshaw or a manual on first aid, in order to discover the appropriate action to meet a particular need or exigency. It is not in the least like a book of poetry, which knows no need or exigency, but exists in its own right. So far from being an art or science, law is merely a pedestrian essential to the progress of civilisation. As such, it has a colossal history behind it—the whole history of social man—and herein lies its insidious fascination. The record of this history,

as revealed by narrators like Maine or Holdsworth, not merely engages and interests, but too often captivates and enthrals, the scholarly mind. The shifts and manœuvres whereby outmoded rules and institutions have been manipulated, circumvented or refurbished for the benefit of succeeding generations tend to inspire a reverential wonder at the ingenuity of the human mind. In our own law we start, roughly speaking, with the feudal system, and observe with increasing admiration over a period of centuries the tortuous machinations of kings, chancellors, land-owners and lawyers, whereby a seemingly cast-iron structure of anachronistic rules was gradually undermined and adapted, all too slowly, to the needs of a progressive society. But while we pursue these studies we should be on our guard. It is fatally easy to mistake the ingenuity of practitioners for legal genius, to attribute to society itself some kind of deep-seated talent for jurisprudence, to attach a mystical significance to preposterous figures like John Doe or "the Casual Ejector," and ultimately to regard the whole hotch-potch of barbarities, accidents, evasions, customs, prejudices, horse-sense and nonsense which we call the Common Law as a sort of supernatural organism which somehow rooted itself in the soil of England at the dawn of modern history and thereafter grew on its own sap and flowered and fruited and enlarged itself until it provided refreshment and shelter for a whole nation of free people. Even the most discerning (perhaps one ought to say, especially the most discerning) of legal minds seem liable to be ensnared by this delusion. Down the ages one sees the same enchantment at work: Edward Coke in the seventeenth century pronounced the Common Law to be the perfection of human reason; Blackstone in the eighteenth lost no opportunity to eulogise it in language even more intemperate; and in our own day Mr. Justice McCardie informed an audience at the Middle Temple that "its work can never be undone. Its spirit and its ideals must ever live. If this country were to sink tomorrow beneath the waves, the record of the Common Law of England would stand for ever on the noblest pages of history."[4]

But the prime exponent and unchallenged high priest of this cult was Sir Frederick Pollock, who became so enamoured and so bewitched in the course of his studies that he ultimately made a goddess of the Common Law, which he conceived as an immortal old lady, always half asleep but never wholly oblivious, constantly supervising the comings and goings of the puny practitioners who were her unconscious servants, ever prepared to bide her time until the exact occasion presented itself for encouraging or rebuking them, yet never too torpid to lift an antique eyelid at the slightest symptom of disorder. It is pathetic that anyone possessed of Pollock's outstanding intellect and exquisite scholarship should thus have fallen victim to an idolatry of his own invention. Indeed, it is worse than pathetic, since his colossal and merited prestige as thinker and historian has spread the heresy far and wide among successive generations of legal students.

Lord Wright, in the Preface to his Legal Essays and Addresses (1939), alludes to the doctrines of contributory negligence and common employment (two first-class blunders of the Common Law), and goes on to say: "In these and in so many like instances the dead hand of the past fastens on the living present. What I have often wondered at is the reverence and even affection with which such old rules are regarded." But surely there is no compelling cause for wonder in this phenomenon? Let the

[4] *The Law, The Advocate, and The Judge* (1927), p. 17.

student wallow for long enough in historical jurisprudence, and he will feel the reverence and affection stealing over him like an opiate unless he remembers to pinch himself and open the window at regular intervals. This highly respectable form of inebriety may be found in many legal authors who have got themselves so bemused by their topic as to lose sight of the fact that law is merely the scaffolding of social life, and not an edifice in its own right. Take, for instance, the law of evidence, perhaps the rankest and most tangled undergrowth of the legal jungle, of which Lord Justice Scott has soberly remarked that "invented to ensure justice, its very rigidity sometimes prevents justice from being done, or so lengthens a case and augments the cost of justice as to make it very like injustice";[5] and compare the panegyric with which Judge Pitt Taylor concluded, in its eighteen hundred and eighty-fifth paragraph, his monumental epic on the subject: "Having now completed the design of this Treatise, in presenting a general view of the Law of Evidence, the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labour from the manner of treatment, and will rise from the study of its principles convinced, with Lord Erskine, that, with some few exceptions, 'they are founded in the charities of religion—in the philosophy of nature—in the truths of history—and in the experience of common life.'" This author was not mad, as one might at first suppose; he was merely suffering from that anæsthesia to practical values which is so readily induced by the prolonged study of law as a "science."

The serious side of this matter is the risk that other students, particularly young students, may go the same way and become equally fuddled if the law is presented to them in this light, and that they will emerge from the law schools as budding practitioners convinced of the "symmetry and beauty" of their subject and already inoculated, as it were, against any disposition towards its practical improvement. There is nothing unreal about this foreboding; it expresses only what has been actually happening for many generations. There is no profession more deeply and defensively entrenched than the legal profession, no body of men whose training and outlook has more utterly inured them to the continuance of the *status quo*. Indoctrinated with certain so-called basic principles, and enmeshed in the intricate entanglements spun round them by their legal ancestors, they are resistant to reform to the last ditch. This resistance is reinforced, subconsciously for the most part, by other considerations: their earning power, for instance, is largely based upon their skilled manipulation of legal complexities and might perhaps be diminished by common-sense reforms; and, in any case, there is a very human disinclination to unlearn a mystery which has been laboriously acquired, even though comparative simplicity may be the alternative. But jurisprudence and legal history have undoubtedly got a lot to answer for.

The point is, that the ultimate and only proper test of law is not whether it answers to certain concepts believed to be basic by philosophic thinkers or whether it presents on paper a symmetrical appearance, but simply whether it works—whether on the pedestrian level of daily life it answers the needs and resolves the difficulties of the common man, to whom the stratosphere of jurisprudence is as uninteresting as it is remote. The substantive law which defines our rights and duties is, of course, important to all of us, but unless the adjective law of procedure is

[5] Preface to *In Quest of Justice*, by Claud Mullins (1930).

a working machine, constantly translating these obligations in terms of Court orders and actual execution, the substantive law might just as well not exist. (A classic example is the Covenant of the League of Nations.) But on the adjective side jurisprudence is dumb. It is true that legal historians are often fascinated by the Court procedure of previous ages and echo with relish Maitland's dictum that the forms of action rule us from their graves (without realising, it would seem, what a deplorable fact this is); but in the modern forms of action they appear to take no interest whatever. Prof. C. K. Allen goes a good deal further than most when he makes the grudging admission that "even matters of procedure touch, ultimately, the fundamental rights which are peculiarly the concern of jurisprudence."[6] In spite of the colossal under-statement involved in the words "even" and "ultimately," this is a great advance on the normal attitude of jurists. Much more representative is Sir John Salmond,[7] who, after defining jurisprudence as "the science of the Civil Law," and dividing it into the three categories of legal exposition, legal history and the science of legislation, goes on to say: "From jurisprudence in its generic sense . . . it is convenient to distinguish a particular department which may be termed theoretical or general jurisprudence to distinguish it from more practical and special departments of legal study, although no hard and fast line can be drawn. This department is . . . concerned with the ultimate or fundamental purpose and conceptions of the Civil Law which it is desirable to consider separately from the more practical branches of legal exposition. . . . It is with this department alone that we are concerned in this book" (that is to say, for the next seven hundred pages). Thus, while the profoundest thinkers juggle with the fundamental purpose of the Civil Law on the highest theoretical plane, adjective law—the *sine qua non* of any law at all—is simply ignored. And if the academic experts will not take it seriously, who will? The practitioners, as a general rule, will not; partly for the reasons I have already explained, and partly because the labour of minding their outmoded machine leaves them too exhausted to think about improving it.

This would not matter if the machine worked at all effectively; but the truth is that, encrusted with the rust of ages, it hardly works at all. This is not merely an unorthodox opinion of my own, but a plain fact apparent to almost all laymen who have ever been mixed up in litigation and to any lawyer whose eyes are not blinded by the sweat of practice or dazzled by the moonshine of jurisprudence. In such a matter, however, the layman hardly dares to lift his voice (for fear of looking as big a fool as he already feels for having litigated at all), and the voices of lawyers are but a few crying in the wilderness. But, few as they are, they all cry the same complaint. Here, in chronological order, are some of their statements—

Mr. Claud Mullins (1930):[8]

> "The system is very uncertain and expensive; its operation is such that in practice the general community has, if it can, to avoid it like the plague."

Mr. Theobald Mathew (1934):[9]

> "From 1873 onwards the Legislature and the Rule Committee have

[6] *Op. cit.*, p. 10.
[7] *Jurisprudence*, 9th ed. (1937), p. 2.
[8] *In Quest of Justice*, p. 3.
[9] *For Lawyers and Others* (1938), pp. 240, 253.

been tinkering with the legal machine, but, by universal consent, the litigant has still cause for grave complaint. . . . In an endeavour to turn the Courts of Justice into a paying proposition, the Court fees —always heavy enough—were raised some ten years ago in every direction. The cost of litigation is greater than ever. Victory is won at heavy expense; defeat is a financial disaster."

Dr. R. M. Jackson (1940):[10]

"There is no section of the community that is satisfied with the present cost of litigation."

Mr. Heber Hart, K.C. (1941):[11]

"The plain truth is that the justice of the courts is unattainable by some citizens through want of the necessary financial resources; while in the case of many others, it is not worth having at the cost which it involves."

The Editor of the *Law Journal* (30th January, 1943) alludes to:

". . . the undeniable fact that in most cases it is not pecuniarily worth while to fight a disputed action in the High Court for £250 or one in the County Court for £40."

The Solicitors' Journal (13th February, 1943) suggests an increased charge on the community to remedy:

". . . the high and sometimes prohibitive cost of litigation to the individual."

What is to be done about it? There are two methods of approach, one of which is wrong and the other right. Let us glance at the wrong one for a moment, only because it is not yet so thoroughly discredited as it ought to be. On the theoretical level it has been suggested that the substantive law could be so remoulded, simplified and codified that any one would be able to understand it, so that all disputes could be settled by reference to the book of rules and no litigation need ever arise. This was one of the dreams of Jeremy Bentham, and insofar as it directed attention to those departments of the substantive law where reform was feasible and long overdue (such as the criminal law and the land law) it was decidedly wholesome. Insofar as it has encouraged jurists to leave the law of procedure alone and to devote their ingenuity to the increased refinement and synthesis of basic legal principles instead, it has done no good at all. Everyone who has studied the subject now knows that the ideal of a law so simple and comprehensive that disputes can never arise is a delusion. (The remarks already made on motor car hire-purchase sufficiently illustrate the point.) Nevertheless, some people are still deluded to the extent that, while they realise that litigation does constantly take place, they still feel that it ought not to take place, and that to discourage it is a positive social service. On one occasion when I was ventilating the subject I was solemnly told by a high official of the Lord Chancellor's department that litigation was in itself a bad thing, and that it was better that what he called "the prudential consideration of costs" should deter people from embarking on it than that the machine should be made to work easily.

[10] *The Machinery of Justice in England*, p. 248.
[11] *The Way to Justice*, p. 17.

The right approach is, of course, the opposite; admit that legal disputes will always arise and set about reconditioning the machinery to deal with them. One thing one can do is to improve the machinery itself. The Rules of the Supreme Court could be much simplified and matters like circuit arrangements and the fixing of dates for trial could be vastly improved. But there must always be a limit to what can be done on these lines, and beyond that limit there will always be the financial problem. However much you cheapen and simplify it, litigation is always going to cost money and the question is, where is that money going to come from? There are at least two possible answers (there may be more). One suggestion which I have already mooted (MODERN LAW REVIEW, Vol. vi, p. 39, December, 1942) is to nationalise the legal profession, so as to make its officers salaried servants of the State (as the judges and court officials already are) instead of competitive practitioners working for private profit. I find, however, that this proposal is too strong meat for most legal stomachs, and, though I still believe it to be sound, I dare say that something less radical may be more acceptable.

There is one obvious alternative which might be very usefully explored from both the theoretical and the practical angles. I have already alluded to the compulsory insurance of motorists against third party liability, and have pointed out that it sometimes produces results which confound the jurists. These, however, are somewhat exceptional instances, and on the whole the system works quite well. It is to be noticed that what the motorist is insured against in practice is not merely his liability to pay compensation to the other party, but also the costs of having that liability, or the other party's liability to himself, determined and its amount assessed. In other words, he is insured against litigation as well as liability. As a judgment debtor, he is solvent; as a successful defendant, he is not out of pocket; as a successful plaintiff against another motorist, he gets paid. In these conditions we have a close approach to those ideal results of litigation which are so commonly taken for granted in students' textbooks but so rarely met with in practice. On the other hand, a pedestrian or cyclist, greatly to his own disadvantage, does not have to be insured. One motorist can bring an action against another with an insurance company behind him and without the terrifying prospect of being ruined by the costs if he does not succeed. A pedestrian, however, has probably no one behind him. If he has a claim against a motorist he will find himself opposed by the ample resources of the latter's insurance company, and will probably be advised by his solicitor to think twice before refusing any tolerable settlement, even though it may be demonstrably inadequate. In other words, he is in the position of any poor litigant who is confronted by an opulent adversary, whether the dispute sounds in contract or tort or any other legal category. Already there are many legal aid societies, tenants' protection associations, and what-not, which do their best in a partial and piecemeal manner to insure against this unhappy situation; but they are inevitably inadequate. What is needed is a comprehensive national system of insurance against litigation in general for persons whose income level does not permit them to stand up for their rights on their own feet. The provision of the machinery for working such a scheme should present no difficulty, for the existing insurance companies would be available to run it, just as the Approved Societies are for National Health Insurance. The collection of premiums is another matter; for, though we are all becoming insurance-minded by

now, I appreciate that, having paid his weekly contribution to the Beveridge scheme, the citizen will probably feel that he has already subscribed enough toward social improvement. But there are other ways. Obviously a large part of the money needed will have to be raised by general taxation, and a proportion, for instance, of the sur-tax paid by the wealthier classes might usefully be allocated to this purpose. On the other hand, those who pay income tax at the medium and lower levels (who would, of course, be the main beneficiaries from the scheme) might be induced to insure themselves against litigation by the allowance of tax reliefs such as they already receive in respect of life insurance. I dare say there are other ways of financing the scheme. At any rate, the difficulty of squeezing money out of the community where it was really wanted has never yet been found to be insuperable.

I am aware that all sorts of objections can be advanced, particularly by the case-hardened veterans of the legal profession, who are always predisposed to think of every imaginable reason for not altering anything. Undoubtedly they will point out that insurance against litigation of all sorts will immediately yield a harvest of frivolous actions—that plaintiffs who have nothing to lose in the event of failure will launch actions against railway companies because trains are late, against local authorities because they have bumped into lamp-posts, against next-door neighbours because their dogs are not house-trained, against the Meteorological Office because there is a fog, and so on. This sort of objection will be urged with all the force of finality. But, in fact, there is nothing final about it. Obviously it is a real objection, but a little determined thinking will readily suggest a way round it. In many cases the forfeiture of his no-claims bonus, and the inevitable loss of time entailed by Court proceedings, will probably deter a litigant of this character; but almost certainly there will be brought forward a quantity of claims so lacking in substance or merit that the insurers will require the right to refuse to back them. To provide for these there will have to be some official or quasi-official machinery for assessing their merits and for granting or withholding certificates entitling the holders to litigate at the expense of their insurers. This is just the sort of function which, in its own field, the Poor Persons' Committee of the Law Society is performing to-day, and this procedure is plainly capable of a much wider extension. I do not propose to explore this in detail; it is enough to indicate the sort of difficulty which can be raised and the sort of solution which at once presents itself if constructive thought, and not merely destructive criticism, is addressed to the subject. By all means let every substantial difficulty be propounded; but let the difficulties also be examined with a real desire to solve them. If they are adjudged to be fatal to this scheme, let those who advance them think of another scheme. Whether an approach along the lines of insurance is the best approach to the problem may be debatable. But let it be debated; and let no one who is concerned to debate it allow himself to be argued into supposing that the present system can properly be left alone, or desist from his study until he has explored all possible approaches to its betterment.

Here, indeed, is a worth-while field for the research worker! What grander objective could be conceived than to fetch down the stately apparatus of legal theory from its Olympian fastness and re-erect it on the level ground where the ordinary citizen can turn the handle and make it work? In all respect and sincerity I adjure the academic jurist to divert

his attention from abstract jurisprudence and from such concrete studies as Anglo-Saxon land tenure or the manumission of slaves in the reign of Hadrian, and to concentrate upon a subject which really matters the huge resources of industry and learning which have already been lavished so unsparingly upon subjects which do not.

C. P. HARVEY.

SOME REFLECTIONS ON COMPANY LAW REFORM

A DISCUSSION of the problems connected with the reform of company law can take as its starting point one of the three social and economic needs to which a system of company law should respond. It can either approach the problem from the angle of the shareholder, and consider as its principal theme the constitution of the company, the protection of the investor who is deprived of an effective share in the management, and the perennial conflict of interest between those responsible for the management of the business and those dependent on the assistance of the law for the safeguarding of adequate information and enforceable minority rights. Another approach would be the interests of the community itself in the distribution or investment of the profits of the concern, in the prevention of fraudulent manipulations, and in that measure of publicity which is the foundation of a well-functioning machinery of company legislation. The present paper is concerned with a third kind of approach and with a more limited range of problems. It tries to analyse a number of topical questions of company law from the point of view of the outside creditor. An attempt is made to help to find a way out of a situation in which originally wholesome institutions have been diverted to uses potentially and actually detrimental to those who, by force of circumstances, may be compelled to give credit to concerns carried on in the form of companies. Two special topics have been singled out for more detailed discussion: that of the abuse of corporate entity, and that of the undermining of the company's capital as a "guarantee fund" by the issue of shares in exchange for overvalued assets.

I

In this country as elsewhere company law has, to a large extent, changed its economic and social function. The privileges of incorporation and of limited liability were originally granted in order to enable a number of capitalists to embark upon risky adventures without shouldering the burden of personal liability. There was, in the second half of the nineteenth century, a definite commercial need for those measures which the various Companies Acts introduced. However, owing to the ease with which companies can be formed in this country, and owing to the rigidity with which the courts applied the corporate entity concept ever since the calamitous decision in *Salomon* v. *Salomon & Co., Ltd.*,[1] a single trader or a group of traders are almost tempted by the law to conduct their business in the form of a limited company, even where no particular business risk is involved, and where no outside capital is required. The partnership

[1] [1897] A.C. 22.

which, either in its normal form or as a limited partnership, ought to be the usual type of business association, has in many walks of commercial life, been almost completely displaced by the private company.

This state of affairs would not necessarily call for reform, if it were not for the fact that the courts have failed to give that protection to the business creditors which should be the corollary of the privilege of limited liability. The courts have adapted the law of fiduciary relationship to the liabilities of promoters and directors.[2] They have thus given a measure of protection to the shareholders over and above that provided by Parliament, and they have succeeded in introducing into British company law a body of principles which, elsewhere, had to be formulated by legislation.[3] The flexibility of the law governing this topic contrasts with the complete failure of the courts to mitigate, through the mechanism of the law of agency, the rigidities of the "folklore" of corporate entity in favour of the legitimate interests of the company's creditors. As it is, the company has often become a means of evading liabilities and of concealing the real interests behind the business.

It is not as if the Courts had been unable to look behind the curtain of "corporate personality," when they were minded to do so. In the law of income tax, the paramount needs of the national exchequer have induced Parliament to tear to shreds the veil of corporate entity where it was used as a cloak for tax avoidance or evasion.[4] In other branches of the law the Courts themselves have lifted the veil. Thus, a company was treated as a member of a trade association though, strictly speaking, it was not the company but its nominee who was registered as a member;[5] while a member of a bankrupt's committee of inspection was treated as such though he appeared in the mask of a representative of a limited company.[6] Closely associated companies were treated as identical for the purposes of the law of negotiable instruments,[7] and in the law of carriage by sea.[8] In *Canada Rice Mills* v. *R.*,[9] the Judicial Committee refused to regard a transaction between a parent company and its subsidiary as a "sale" for the purposes of a Canadian taxing statute. In another Canadian case[10] the Privy Council came to the conclusion that a valid covenant in restraint of trade is violated if the covenantor acquires a "controlling" interest in a competing company, and Farwell J. held[11] that an industrial and provident society and a company which succeeds to its assets may be separate entities "in law," but "in substance and in truth exactly the same thing" for the purposes of the application of a trust fund.

There are even cases where, despite *Salomon* v. *Salomon & Co.*, a

[2] *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218. *Gluckstein* v. *Barnes*, [1900] A.C. 240. *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56.

[3] See, for example, the German law of July 18th, 1884.

[4] Finance Act, 1922, sect. 21. Finance Act, 1927, sects. 34, 35. Finance Act, 1936, sects. 19, 20. Finance Act, 1937, sect. 14. Finance Act, 1938, sect. 37. Finance Act, 1939, sect. 38.

[5] *Liverpool Corn Trade Association, Ltd.* v. *Monro*, [1926] 2 All E.R. 991.

[6] *Re Bulmer*, [1936] 3 All E.R. 775.

[7] *Bird & Co.* (*Smithfield*), *Ltd.* v. *Hill & Co.*, *Cook & Son, Ltd.* and *Thomas Cook & Son, Ltd.*, [1937] 1 All E.R. 515.

[8] [illegible] 1 All E.R. 150—a very instructive case showing the tragi-[illegible] be created by a multitude of corporate persons which [illegible] are only for the purposes of taxation."

[9] [illegible] 3 All E.R. 991.

[10] *Connors Bros., Ltd.*, v. *Connors*, [1940] 4 All E.R. 179.

[11] In *Re London Housing Society's Trust Deeds*, [1940] Ch. 777.

company was treated as the trading agent either of its parent company[12] or of its controlling shareholder,[13] though, of course, the Courts were prevented by the strait-jacket of the *Salomon* decision from holding the latter liable for debts contracted by the company as his agent.

But even outside the immediate scope of application of the *Salomon* rule the "corporate entity" metaphor continues to hold its tyrannical sway. Indeed, in many cases it is a matter of guesswork whether the Court will allow the parties to "draw the veil" or force them to lift it. It is not, of course, as if the superannuated conflict between the "realists" and the believers in the fictitious nature of corporate personality had anything to do with this. The need for lifting the veil must be obvious to the realists even more than to those who, like the present writer, have never been convinced by the reasoning of Maitland or Gierke. Why should a parent company be unable to deduct its subsidiary's trading losses as a revenue expense from its taxable income?[14] Why should it be unable to claim an insurable interest in the latter's property?[15] On the other hand, why should the Canadian Revenue authorities not be "entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence" of two very closely associated companies in connection with the fixing of depreciation allowances?[16] And is it tolerable that business men should be able to rid themselves of their liabilities, just because when assigning assets belonging to a company which is a "sham simulacrum and a cloak" they fail to act as shareholders or directors rather than as individuals?[17] Or that a business is no longer treated as that of an insured person for the purposes of a motor policy because it has been "converted" into a company controlled by him?[18] Or that the limitation of liability under the Merchant Shipping Act cannot be claimed by a shipowning company because the guilty vessel happens to belong to a subsidiary?[19]

Enough has been said to prove that the surfeit of companies introduces into many branches of the law an element of caprice incompatible with the certainty which is the life-blood of commercial law. The metaphysical separation between a man in his individual capacity and his capacity as a one-man-company can be used to defraud his creditors[20] who are exposed to grave injury owing to the timidity of the Courts and of the Companies Act.[21] Sometimes, as shown by the cases concerning insurable interest and the shipowner's limitation of liability, "corporate entity" works like a boomerang and hits the man who was trying to use it.

[12] *Smith, Stone & Knight, Ltd.*, v. *Birmingham Corporation*, 101 L.T. 371. See a note in 3 MOD. L. R., 226.

[13] *Southern* v. *Watson*, [1940] 3 All E.R. 439.

[14] *Odhams Press, Ltd.*, v. *Cook*, [1940] 3 All E.R. 15.

[15] *General Accident, etc., Corporation* v. *Midland Bank, Ltd.*, [1940] 2 K.B. 388. And see *Macaura* v. *Northern Assurance Co.*, [1925] A.C. 619.

[16] *[illegible] Laundry, etc., Ltd.*, v. *Minister of National Revenue*, [1937] 3 All E.R. 5.

[17] *[illegible] Ltd.*, v. *Lord[illegible] Bank*, [1937] 3 All E.R. 555.

[18] *Lonsdale & Thompson, Ltd.*, v. *Provincial Insurance Co.*, 54 Ll.L.R. 68.

[19] *William Cory & Son, Ltd.*, v. *Dorman Long & Co., Ltd.*, 55 Ll.L.R. 1.

[20] One is tempted to quote Mme. de Staël: "[illegible] intervénir la métaphysique dans les affaires, elle sert à tout [illegible] peut [illegible] et l'on prépare ainsi les brouillards pour asile à sa [illegible]."

[21] Sect. 275 is a very half-hearted and inadequate attempt to [illegible] problem. Its principal defect is that it introduces the psychological [illegible] "intent to defraud," "fraudulent purpose." The Courts have tried to give these terms a common-sense interpretation: *Re W. C. Leitch Bros.*, [1932] 2 Ch. D. [illegible]

What can be done? How is it possible to check the one-man-company and other abuses of company law for purposes which it was never meant to serve? Is it conceivable that *Salomon's* case can be abrogated by legislation? Could the interests of outside creditors be protected by a general clause under which persons owning a controlling interest in a company would be liable for its debts? Or could there be a provision according to which a company would be deemed to act as agent for the owners of controlling interests? The difficulty of defining a controlling interest might not be insurmountable, as shown by the precedent of income tax law.[22] Nevertheless, there may be objections to such a course. The definition of a controlling interest might either be framed in very general terms and thus leave a wide scope to the discretion of the Courts, or it might be as strict as that of income tax legislation. In the former case the present uncertainty, though mitigated, would continue to exist, in the latter case the present hardships would not be removed in marginal situations.

Moreover, as shown by the above random examples, it is not just a question of overruling the *Salomon* case. The clash between "law" and "truth and substance" occurs not only to the detriment of the company's creditors. The incongruity of the present situation permeates the whole of legal business life—revenue law no less than insurance, shipping, and carriage by land.[23] A "general clause" might have to be even more general than the one suggested above. It might have to ordain that a company and the owners of the controlling interests must be treated as one for all legal purposes. The unforeseeable consequences of such a sweeping provision are likely to deter the legislature from adopting it. It is, however, not easy to see why company law should not be able to lift the veil of corporate entity, at least in extreme cases, for the benefit of the creditors if revenue law has been able to achieve this in the interests of the Treasury. A limited general clause should be seriously considered.

Perhaps a remedy can be found in a different direction as well. Instead of, or in addition to, altering the legal consequences of company formation, one might make the formation of companies more difficult and more expensive, and thus reduce the number of companies and especially of small companies. By doing so, Parliament might go some way towards restoring to the limited company its original function, and to the partnership its proper place in business life.

At the present moment, it is almost unbelievably easy and even more unbelievably cheap to form a company in this country. One of the conspicuous features of British company law is the complete separation between the creation of the *persona* and the raising of the company's capital. Forming the company and floating the company are two distinct processes. It is true that a public company which issues a prospectus can neither commence to carry on its business nor exercise its borrowing powers before it has obtained from its shareholders subscriptions covering the purchase price of property to be paid for out of the issue, preliminary expenses and working capital.[24] But this has no application to private companies or to public companies which do not choose to invite the public

[22] See the legislation, mentioned above in note (4), which deals with sur-tax on undistributed profits of investment companies and their subsidiaries.

[23] *Wurzel* v. *Houghton, etc., Ltd.*, 155 L.T. 575.

[24] Sects. 94 and 39 of the Companies Act, 1929, and Schedule IV, Part I No. 5 (i).

to subscribe to its shares. In other words: the vast majority of all companies can come into being, not only legally but also commercially, without having raised more than the seven or two shares to be subscribed by those who sign the Memorandum. Might it not be possible to extend the provisions of section 94 (i) (*a*) of the Companies Act so as to cover the case of section 94 (ii), and to repeal section 94 (vii) (*a*)—in other words, to extend the existing provision as to minimum subscription to all companies —public as well as private, if indeed there is a future for private companies? Could one go further, and amalgamate the act of incorporation (sect. 13) with the granting of the trading certificate (sect. 94 (3))? The floating stage would thus precede rather than follow the creation of the *persona*, and it would be the personal responsibility of the promoters to find the necessary share capital before the company is formed. The act of signing the Memorandum and Articles would thus regain a real significance, and the air of unreality would be removed from these preliminary proceedings. The company would not be born before it had legs to stand upon.

If British law came closer to those systems which connect the act of company formation with the raising of the capital, one obstacle would be placed in the way of the wholesale abuse of corporate personality. But other steps are necessary. The law fails to provide for any minimum capital. It is possible to form a company with a capital of £10. There can be little doubt that, in certain exceptional cases, the small company has its legitimate place in the social system. It would be a mistake to prevent a businessman from converting his undertaking into a company in order to facilitate the distribution of his financial interests among his children. Nor should the law stand in the way of those who try to embark upon an uncertain enterprise—the exploitation of a patent, the opening up of a new line of trade—with small means and to safeguard themselves against personal liability. It is, however, submitted that those who wish to do so should bear the burden of making out a case. In other words: the formation of companies with an initial issued capital below a certain minimum—say £5,000—should no longer be a matter as of right. It should be a precondition of registration that the subscribers to the Memorandum produce a certificate from the Board of Trade which confirms that, in view of the risks involved in the enterprise or for other reasons, there is justification for the formation of the company and that the holders of the controlling interests are personally reliable. This certificate should not be open to public inspection. Such a provision might act as a very powerful deterrent, and counteract the misuse of companies for fraudulent purposes. If this suggestion is thought to invest the Civil Service with too large and uncontrollable powers, it would seem to be better altogether to prohibit the formation of small companies rather than to leave things as they are at the moment.

It is open to doubt whether there is a case for the continued existence of private companies. The fact that, according to sect. 110 of the Companies Act, a private company is not compelled to give any publicity to its financial status is probably the most tempting feature of this form of business association. This encroachment upon the principle of publicity is said to be justified by the fact that the company may not approach the outside public for subscriptions to either share or loan capital. Nevertheless, it is open to objections. A large number of people may be compelled to give credit to the company without being in a position to demand inspection of its books. This may be true of suppliers of goods as well as

of services, and it is the unsecured creditor of this type who, when things come to a head, is likely to be among those most interested in the company's financial position. *Delirant reges, plectuntur Achivi.* The purchase price for the privileges of incorporation and limited liability is too low in the case of a private company. It is true that an institution of this kind exists in many foreign countries—the *Société à Responsabilité Limitée* was introduced in France in 1863 and amended in 1925, the *Gesellschaft mit beschränkter Haftung*, introduced in 1892, is a popular and much abused form of business association in Germany. However, all the legitimate demands that there may be for a form of company satisfying the needs of those who have no intention of inviting the public to participate can be covered by such provisions as those in sect. 40 of the Companies Act which distinguishes between the issue of a prospectus and the filing of a statement in lieu of prospectus. Once it is agreed that an ample measure of publicity is the necessary corollary of the limitation of liability, it is difficult to see why any business association should be able to enjoy this privilege without giving to any prospective creditor the opportunity of satisfying himself that the company's assets are not encumbered with debts which might jeopardise the securtiy of his claim and which are not included in the list of "charges" publicised under sect. 79.

To sum up: The following possible suggestions might be made with a view to counteracting the present abuses of the principle of corporate entity—

(*a*) An amendment of either the Stamp Act, 1891, as amended by the Finance Act, 1933, so as to raise the present capital duty of 10 shillings for every £100 or fraction of the capital, or of Schedule X of the Companies Act, 1929, so as to raise the registration fees, or preferably, both.

(*b*) A minimum capital so that no company with an initial issued capital lower than the minimum could either be formed at all, or formed without the approval of the Board of Trade, to be given only if the promoters or subscribers to the Memorandum can satisfy the Board that in view of the special risks involved or for other adequate reasons the formation of the company is justified.

(*c*) The abolition of private companies, or, at least, the repeal of the words "where the company is a private company or" in sect. 110 (3) of the Companies Act, 1929. The transformation of existing private companies into partnerships should be facilitated.

(*d*) No company to be registered unless the promoters can satisfy the Registrar that shares covering the minimum subscription as defined in Schedule IV, Part i, Nr. V, have been subscribed.

(*e*) A general clause might be contemplated according to which a company effectively controlled by less than, say, ten persons, whether as shareholders or otherwise, is deemed to act as agent for these persons.

II

It is, however, in many other respects apart from the private company's special privileges, that the present company law falls short of a desirable standard of publicity.[25] One of the most glaring examples is

[25] We mention in passing the astonishing solicitude with which the Companies Act prevents the shareholders, the creditors, and the public in general from obtaining any detailed knowledge of the remuneration of directors. Sect. 148 gives to shareholders entitled to not less than one-fourth of the total voting power the right to demand a statement of the directors' remuneration during the last three

what is known as the "allotment of shares for a consideration other than cash." It is a truism that it is one of the principal purposes of all company legislation to enforce the raising and maintaining of the capital as a guarantee fund for the company's creditors. In this country it was the combined effect of judicial and parliamentary legislation which produced the principles subservient to this paramount end. It was the Judiciary and not the Legislature which set its face against the issuing of shares at a discount,[26] and against the acquisition by a company of its own shares,[27] but it was the Legislature which created the necessary safeguards surrounding the payment of underwriting commission,[28] the financing by a company of the purchase of its own shares by others,[29] and, above all, the reduction of the company's capital.[30] There is, thus, a system of principles intended to enable a creditor to rely on the reality of the issued capital of the company. I.e. there is a body of rules helping to prevent the company from pretending to an issue of capital which has not in fact taken place and from returning, by way of payment or cancellation of debt, to the shareholders those amounts which represent the capital issue. That every penny of the alleged issued capital of a company should be represented either by an actual payment into its coffers or by an enforceable liability of a shareholder to the company, this would seem to be one of the governing tenets of every sound system of company law. To give effect to this golden rule is a duty which the law owes to the community. For the corporate person which has "no soul to be saved and no body to be kicked," the criterion of solvency must be provided by the law which creates the *persona*. The criterion is the issued capital, and, if that becomes a sham, the bottom is knocked out of the machinery of company law.

The Companies Act is remarkably liberal towards the prospective shareholder who wishes to acquire shares for a consideration other than cash. It is true that a company which offers shares to the public for subscription must raise at least 5 per cent of the nominal amount in money.[31] It is also true that, upon a first allotment of shares to members of the public, but not upon subsequent allotment,[32] shares covering the purchase price of property, preliminary expenses, working capital, etc., must have been subscribed in cash before any allotment can be made,[33] and that the company cannot commence business before shares covering this minimum subscription have been allotted.[34] But it is fairly obvious that none of these provisions is likely to meet the case of allotments for

preceding years. But this is a global statement and subsect. 1, Proviso (ii) takes great care to keep the incomes of individual directors shrouded in darkness. More than that: a simple majority of the shareholders' meeting can overrule the demand for a statement—and where are the directors who could not command the goodwill of a simple majority? Sect. 148 reads as if it had been meant as a dead letter. The tenderness towards directors who desire to keep their remuneration a closely guarded secret is misplaced. A minority of shareholders should be able to demand the disclosure of individual fees and salaries, without being liable to be overruled by a majority.

[26] *Ooregum Gold Mining Co., Ltd.*, v. *Roper*, [1892] A.C. 125.

[27] *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409.

[28] Sect. 43.

[29] Sect. 45. See, however, the gap in the law revealed by the recent decision of the Court of Appeal in *Re V.G.M. Holdings, Ltd.*, [1942] 1 All E.R. 224.

[30] Sects. 55 to 60.

[31] Sect. 39 (3).

[32] Sect. 39 (6).

[33] Sect. 39 (1) and Sched. IV, Part I, No. 5.

[34] Sect. 94.

consideration in kind which is apt detrimentally to affect the creditors of the concern. It is not the "public" who acquire shares in exchange for real property, for concessions, patents, goodwill, stock in trade, equipment, etc. Those most likely to use and to abuse the generosity of British company law in this respect are the Founding Fathers of the company and their friends, the holders of controlling interests and the directors, and it should be noted that none of the safeguards embodied in sect. 39 and in sect. 94 (i) (*a*) apply either to a private company or to a public company which raises its funds "from its friends" by issuing a statement in lieu of prospectus.

The only provisions to force a liability to cash payment on "insiders" are those dealing with directors' qualification shares,[35] though their real object is to ensure that the directors have a stake in the enterprise. Curiously enough, there is nothing in the law to compel any company to adopt a qualification clause in its Articles, and it can even contract out of the more than meagre provision of Table A,[36] according to which a director's qualification is "the holding of at least one share in the company." But in practice this has, perhaps, not led to much inconvenience, since the adoption of a more exacting qualification rule seems to be very usual. The Act surrounds such a rule, whether it is the skeleton Article Table A, nr. 66, or any other Article adopted by the company, with a number of formidable and stringent sanctions. However, these sanctions are to a very large extent only enforceable against public companies, and not against those private companies which choose to appoint directors.[37] Thus, the rule that a director vacates his office after two months if he has not taken up his qualification, applies to both types,[38] but it is only in the case of the public company that the taking up of the qualification is a precondition of his appointment,[39] and, upon a first issue, of the company's right to commence business and to exercise its borrowing powers.[40] The Courts have given additional strength to these rules by preventing directors from obtaining their qualifications from the promoters—either by way of purchase or by way of gift[41]—but, strangely enough, they do not object to a director's taking up of his qualification as a trustee[42]—except for the promoters—even though the Articles may enjoin the director to hold his qualification "in his own right," a construction which, as Palmer rightly says,[43] "goes far to defeat the object of the clause, that the director shall have a substantial share in the company."

The enforcement of a cash payment is only an incidental and ancillary result of the provisions relating to qualification shares. They have been mentioned here because the elaborate rules of law giving effect to the "stake in the company" principle and to the desire to offer some financial guarantee for the directors' loyalty stand in vivid contrast to the meagreness of the guarantees given to the creditors against underhand dealings between the company and those who assign to it assets of all kinds in exchange for shares. The paramount danger is, of course, that of the

[35] Sects. 140, 141, Sect. 94.
[36] No. 66.
[37] A private company is not required to have any directors. Sect. 139 (2).
[38] Sect. 141.
[39] Sect. 140.
[40] Sect. 94.
[41] *Hay's Case* (1875), 10 App. Cas. 604. *Archer's Case*, [1892] 1 Ch. 322.
[42] *Pulbrook* v. *Richmond Consolidated Co.*, 9 Ch.D. 610.
[43] Palmer's *Company Law*, 17th Ed., p. 172.

overvaluation of such assets. One would have expected the Companies Act and the Courts to take some effective steps to prevent a company from issuing shares for an overvalued consideration. Such overvaluation means that the company, while pretending to have increased the creditors' guarantee fund by a stated amount—the nominal value of the shares issued—has, in fact, acted precisely as if the shares had been issued at a discount. The least one would have been entitled to look for is obviously a set of provisions giving the public ample opportunity of checking the basis of the valuation. Yet, those provisions in the Act which attempt to give a measure of publicity to this kind of transaction, sect. 42 (1) (*b*) and sect. 42 (2), do not afford the outsider any knowledge as to how and why anyone could have arrived at the valuation placed upon those assets. All that the company is compelled to do is to deliver to the Registrar for registration the contract, or if it is not reduced to writing, particulars of the contract, which constitutes the title of the allottee to the allotment, and further any contract of sale, for services, etc., in respect of which the allotment was made, together with a return of the number and nominal amount of the shares, the extent to which they are regarded as paid up, and of the consideration. How can a member of the public—say a prospective creditor—form an intelligent opinion of the commercial basis of the transaction? All he is given to understand is that such and such a patent, concession, equipment, etc., was transferred to the company by X and that X got so many shares of such and such a nominal value in exchange. How the valuation was arrived at, remains a mystery to him, and he is not even told whether an independent valuer or auditor had been called in when the bargain was made. For all he knows, the correlation between the total nominal amount of the shares and the assets given in return may be purely arbitrary. And, in so far as private companies are concerned, that is all the information vouchsafed to him by the Companies Act.

If the company is a public company, there are additional guarantees of publicity. A public company must, upon its first or a subsequent issue of shares or debentures[44] to the public, disclose in its prospectus particulars of shares (and debentures) issued, within the two preceding years, either fully or partly, for a consideration other than cash.[45] These particulars include the number and amount of shares and debentures so issued, the extent to which they have been paid up in cash (if they were partly issued for a cash consideration) and the consideration itself. Moreover, in certain cases the company must go further and publish in its prospectus the names and addresses of the vendors of property, the amount payable to each vendor in cash, shares, debentures, and—this is important—a specification of the amounts payable for goodwill.[46] This has to be done where the purchase or acquisition of property is as yet incomplete when the prospectus is issued, and also where the whole or part of the cash portion of the purchase price is to be covered out of the proceeds of the issue in connection with which the prospectus is published. Finally, we must mention the well-known provision[47] giving publicity to contracts made within the last two years before the issue of the prospectus, and the

[44] See Sects. 35 and 38o. Note the exceptions in Sect. 35 (3) (*b*) and Sect. 35 (5).
[45] Sched. IV, Part I, No. 7.
[46] *Ibid.*, Nos. 8, 9.
[47] Sched. IV, Part I, No. 13.

rule[48] which forces a company, at least within the first two years after the issue of the trading certificate, to inform the public of the interests of its directors in property proposed to be acquired by the company, and of sums paid or to be paid to them in cash, shares or otherwise, by anyone for services rendered in connection with its promotion and formation.

All this no doubt is valuable information from the point of view of the prospective share- or debenture-holder, and even the outside creditor may derive some benefit from these disclosures when he is faced with the decision whether or not to give credit to the concern. Moreover, a glance at the Fifth Schedule shows that substantially the same information must be given by a public company which does not allot shares or debentures to the public but delivers a statement in lieu.[49] Thus the outsider can, in the case of every public company, obtain from the Registrar's file a fairly full conspectus of all such allotments.

Nevertheless, even these provisions do not satisfy the demand that the public should be in a position to scrutinise the basis of the valuation of those assets which the company has acquired, or intends to acquire, in exchange for issued capital. This deficiency is in no way remedied by those provisions which compel a public company to publish an accountant's report of the profits of a business to be acquired and paid for (partly or in full) out of the proceeds of an issue.[50] This requirement touches only the fringes of our problem. It enables the public to form an opinion of the value of the consideration for which shares have been allotted only where the allotment was partly for cash and partly for shares, and where the consideration was a "business." It also concerns only one aspect of the matter, the profits made during the last three years or less. It does not provide for an independent investigation.

Having thus been disappointed by the Statute Book, we search the Law Reports in order to see whether the Courts have succeeded in framing some rules of law which might give a guarantee against overvaluation of assets. It would not have been beyond the power of the Courts to do so. English judges have often shown a profound insight into the special needs of company law. They have not hesitated to mount that "unruly horse," public policy, and adapt its pace to the requirements and to the structure of this branch of the law. Restrictions have been imposed upon the freedom of contract between a company and its shareholders in order to give effect to the paramount need for preserving the company's capital: restrictions affecting the grants of discounts,[51] the release of the liability to pay calls,[52] the purchase by a company of its own shares,[53] the promise of dividends out of capital.[54] In all these cases the protection of the company's creditors was considered as part of that "general policy of the law" which is capable of invalidating contracts. A similar line of thought might have led to a principle of judge made law according to which either a contract for the allotment of shares for a consideration other than cash would have been invalid unless the consideration was proved to be adequate, or—preferably—a shareholder could not by a transfer of property discharge

[48] *Ibid.* No. 15, and Part III, No. 1.
[49] Sect. 40.
[50] Sched. IV, Part II, No. 2, and Part III, No. 5, Schedule V.
[51] See above, note (26).
[52] Lindley, L.J., in *Re Wragg*, [1897] 1 Ch. at p. 829. Clauson, L.J., in *Re White Star Line, Ltd.*, [1938] 1 All E.R. at p. 610. Note that this does not extend either to accord and satisfaction or to set-off.
[53] See above, note (27).
[54] E.g. *Bond* v. *Barrow Haematite Co.*, [1902] 1 Ch. 353.

his primary liability to pay cash unless he could show that the property transferred was equivalent in value to the nominal amount of the shares. It is true that such a rule would have forced the Courts to scrutinise the adequacy of the consideration, and would have imposed upon the judges a far more complicated—and far more positive—task than the merely prohibitive principles governing the issue of shares at a discount, etc. But we are not unfamiliar with the phenomenon that the Courts have had to take upon themselves the burden of examining the adequacy of the consideration in contexts where questions of public policy were involved, either because they were forced to do so by statute, as under sect. 7 of the Railway and Canal Traffic Act, 1854, or because they themselves had to make the general principles of the law of contract yield to the unanswerable claims of a judicially recognised public policy, as in the case of certain contracts made by infants.[55] In the case of contracts for the allotment of shares for a non-monetary consideration, however, the Courts fought shy of adapting the general doctrines of contract law to the needs of the situation. They found themselves paralysed by the magic of the doctrine that "consideration must be real but need not be adequate." *In re Wragg*,[56] finally establishes that the Courts will not go into the question whether the value of the assets transferred in exchange for the allotment of shares bears any relation to the latters' nominal value.

There are certain exceptions, but none of them affects the bulk of the cases to which the principle applies. Of course, if the company acts "dishonestly," or "colourably," or has been "so imposed upon as to be entitled to be relieved from its bargain,"[57] or if the consideration is "illusory,"[58] the contract will not stand. But these are only applications of the general principles of the law of contract. If fraud on the creditors can be proved, the contract is void on general principles of public policy.[59] If the company can show that it was deceived or even innocently misled by the shareholder, the contract will be voidable. If the consideration is "illusory," the rules as to total failure of consideration will come into play. Most of these exceptions—all, in fact, but the last—introduce a "subjective" element. They shift the emphasis from the comparison between the objective value of the assets and the nominal amount of the shares to the tricky and slippery field of a scrutiny of the parties' state of mind.[60] The rule as to "illusory considerations," however, may help to adjust extreme and very unusual situations, like that of the assignment of an expired patent, cases which are so helpful to the teacher and the student of law, and so insignificant to the practitioner. And the same would seem to be true of those unfortunate instances in which a draftsman has been so ill advised or inexperienced as to make it obvious on the face of the contract that the nominal value of the shares exceeded the value of the assets to be transferred. That the Courts have, in such cases, refused to allow the shareholder to "get away with it," would seem to be nothing more than a warning to those concerned, not to be too careless in their efforts

[55] E.g. *Clements* v. *L.N.W. Ry. Co.*, [1894] 2 Q.B. 482.
[56] [1897] 1 Ch. 796.
[57] *Per* Lindley, L.J., in *Re Wragg*, above.
[58] *Ibid.*, *per* A. L. Smith, L.J.
[59] *Scott* v. *Brown, Doering and McNab Co.*, [1892] 2 Q.B. 724. *Alexander* v. *Rayson*, [1936] 1 K.B. 169.
[60] "A payment is an effective payment in money's worth if the consideration given by way of payment is something which is *bona fide* regarded by the parties to the payment as fairly representing the sum which the payment is to discharge." *Per* Clauson, L.J., in *Re White Star Line, Ltd.*, [1938] 1 All E.R., at p. 611.

to conceal whatever discrepancy between appearance and reality may exist in fact. Decisions like *Hong Kong and China Gas Co.* v. *Glen*,[61] are of an exceptional nature, and so is *Re White Star Line, Ltd.*,[62] where the acceptance of "deferred creditors' certificates" by the White Star Line, Ltd., from its shareholder, the Royal Mail Co., was, in the words of Clauson, L.J.,[63] "in effect a release of the Royal Mail Co. of the liability which they could not meet at the time."

It is arguable that the task of examining the adequacy of the consideration in cases of this kind is not one which the Courts should be asked to perform. It is an administrative and not a judicial function. Hence the remedy cannot be found in a simple rule which imposes upon the shareholder the liability either to pay in cash or to transfer assets which—ultimately in the opinion of a Court of law—are equal in value to the nominal amount of the shares. It would be inopportune to leave this question to the hazards of litigation. Judges cannot act as auditors and valuers, and they wisely refuse to do so, though their abstemiousness need not perhaps go as far as it did in cases like *Re Wragg*. The following measures might go some way towards protecting the creditors of the concern against the overvaluation of property given in consideration for shares—

(*a*) Among the documents to be delivered to the Registrar under what is now sect. 42, there should be a detailed valuation of the assets made by an independent auditor, including, in the case of the transfer of a business, a complete audit. The particulars enumerated in what is now Schedule IV, Part I, Nos. 7, 8, 9, should be communicated to the public in a separate document to be delivered to the Registrar. Thus, even if private companies continue to exist (though, as said above, a great deal can be urged against their survival), all the publicity safeguards at present imposed upon public companies would enure to the benefit of creditors of private companies.

(*b*) No issue of shares for a consideration other than cash should be permissible without the sanction of an independent authority, preferably the Board of Trade, such sanction to be withheld unless the company can satisfy the Board of the adequacy of the valuation. The details of this investigation could not, perhaps, be published, but the issue of the shares should not be allowed to take place, unless and until the Board of Trade —or whoever else the investigating authority may be—has certified its approval and a copy of the certificate has been delivered to the Registrar by the company.

(*c*) The old rule of sect. 25 of the Companies Act, 1867—abolished in 1900—should be restored in a modified form. Under the old system compliance with the publicity provisions of the law was a condition of the exercise of the shareholder's power of discharging his liability by a transfer of money's worth rather than by a payment of money. Unless and until the necessary documents—including valuation and audit and a copy of the Board of Trade certificate—have been delivered to the Registrar, the shareholder to whom the shares have been issued should remain liable to pay cash in full. This should be so even though the share certificates issued to him purport to certify that the shares are fully paid, and notwithstanding *Bloomenthal* v. *Ford*[64]—the company should not be

[61] [1914] 1 Ch. 527.
[62] [1938] Ch. 458, [1938] 1 All E.R. 607.
[63] [1938] 1 All E.R., at p. 613.
[64] [1897] A.C. 156.

estopped from denying that it has received payment for the shares. *Bona fide* purchasers of the shares should be protected against calls, but the original allottee should remain liable.

(*d*) None of these measures would be of much avail, unless legislation was passed to exclude the possibility of evading the law by means of set-off and of accord and satisfaction. There is nothing to choose between an agreement by which a company allots shares for a non-monetary consideration and an agreement by which it either settles a claim for calls in cash by accepting a non-monetary asset in satisfaction,[65] or agrees to set off[66] its own claim for calls in cash against a shareholder's claim arising from a sale of assets to the company. Set-off, as well as accord and satisfaction as between shareholder and company should be treated as valid only if they comply with the requirements laid down for contracts for the allotment of shares for a consideration other than cash.

(*e*) It goes without saying that the tentative suggestions made in this article will be ineffective unless it is possible to solve the nominee problem. The basis of the creditors' security is either the paid-up capital or the personal credit of those shareholders who are still liable to pay calls. It is with a view to giving effect to this basis of the company's credit that the above suggestions have been made. If the creditor is kept in ignorance as to who the real shareholders are, if their names are concealed behind a protective screen of nominee companies, measures such as those suggested above are useless. It is not the object of this paper to deal with the nominee problem. Whether the rule of sect. 101 that "trusts must be kept off the register" should be repealed, how far such a repeal would contribute to the solution of the nominee problem, or whether, for the sake of facilitating transfers, sect. 101 should remain as it is, but a special register of beneficial ownership be introduced—these are weighty and complicated questions beyond the scope of this article.

O. KAHN-FREUND.

STATUTES

The Law Reform (Frustrated Contracts) Act, 1943

This Act makes two, and probably three, important changes in the common law relating to frustration. The three rules of the common law that are affected by it may be stated as follows—

(i) The rule in *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651. Where a party enters into an entire contract and performs in part but fails to complete, otherwise than as a result of a breach of contract by the other party, he can recover nothing.

(ii) The rule in the *Fibrosa* case, [1943] A.C. 32. Where money is paid in advance under a contract, and the payer fails to receive the whole of the benefit expected by him[1] under the contract (this failure not being due to his own breach of contract), the money may be recovered back in quasi-contract as money paid on a consideration that has wholly failed. It is immaterial that the payee has suffered a detriment in performing his part, and he cannot deduct any part of the sum for expenses so incurred.

(iii) The rule in *Whincup* v. *Hughes* (1871), L.R. 6 C.P. 78. Money

[65] See above, note 52.

[66] Such an agreement is valid under the present law: *Laroque* v. *Beauchemin*, [1897] A.C. 358.

cannot be recovered back merely because the consideration for the payment fails in part. The failure of consideration is regarded as partial and not as total if the payer has received any part of the benefit expected by him[1] under the contract.

The Act begins by providing, in sect. 1 (1), that "where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto."

Sect. 1 (2) then declares that "all sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred."

The proviso to this sub-section modifies the second of the common-law rules above stated, substantially on the lines suggested by the Law Revision Committee in its Report on the Rule in *Chandler* v. *Webster* (Cmd. 6009 of 1939). It is to be noticed that the Act does not make it mandatory upon the court to order the retention or payment of the whole or any part of the expenses incurred. It is left to the court's sense of justice whether it orders a retention or payment in respect of expenses, and also (if it decides to make an order) the amount of such retention or payment. The only limits upon the court's discretion are that it must not under this sub-section order the retention or payment of an amount in excess of the expenses incurred (in cases falling within the next sub-section, however, it may do so), and that in the case of money payable but not paid before the happening of the event causing the impossibility or frustration, the court must not under this sub-section order a payment in excess of the amount so payable (again under the next sub-section it may do so).

Another change in the common law seems to follow from the opening words of the sub-section. At common law the principle of the *Fibrosa* case is limited by the principle of *Whincup* v. *Hughes* (the third of the three principles stated at the beginning of this note), so that money paid cannot be recovered back if there is only a partial failure of consideration. It seems evident, however, that the remedy given by this sub-section is not so limited, and that money paid can be recovered back even though the failure of consideration is only partial. This appears partly from the wording of the sub-section, which speaks of the money paid being recovered back as money received to the plaintiff's use, not as money paid on a consideration that has failed; the rules relating to failure of consideration are therefore irrelevant. It also appears from the next sub-section, which, coupled with the proviso to the present sub-section, contemplates that the

[1] The words "expected by him," though lacking in precision, are the best that can be done to express the law of failure of consideration. See Williams in McElroy, *Impossibility of Performance*, 88–89.

payer may have received some benefit under the contract, in which case the failure of consideration would be not total but only partial. Finally, the machinery of the Act is well adapted to deal with a case of partial failure of consideration, and it would be a great pity if such partial failure were excluded from its scope. At common law money paid on a consideration that has failed in part cannot be recovered back because (i) it would be unfair to permit recovery back of the whole, and (ii) apportionment has not at common law been regarded as possible. Under the present Act apportionment is possible, and therefore the reason for forbidding recovery back on a partial failure of consideration is robbed of its force.

At the same time, it is somewhat peculiar that the Act is not more explicit on this important question. Perhaps the explanation is that the question was not present to the mind of the draftsman. This seems to be confirmed by the fact that the Lord Chancellor, in moving the second reading of the Bill (as it then was) in the House of Lords, referred to "the two changes which we seek to introduce into the law"[2] (i.e. the changes in the first and second of the three common-law rules set out above), without seeming to be aware of this third change, if change there be.

The last change in the common law is effected by sect. 1 (3), which runs as follows: "Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular—

(*a*) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(*b*) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

This subsection reverses what may be called the rule in *Appleby* v. *Myers* (above). Unlike subsection (2), this subsection is not confined to cases where money has been paid or stipulated to be paid in advance, but extends to all cases where a party is unable to claim the full contract remuneration owing to a frustrating event, but by his partial performance has conferred a benefit upon the other side. The subsection thus creates a new and important head of quasi-contractual liability in English law. Incidentally, it brings English law into conformity with the rule adopted in the American Law Institute's *Restatement of the Law of Contracts* (sect. 468), and with the law of Scotland.

Sect. 1 (4) provides that the court may include under "expenses" a sum in respect of overhead expenses and in respect of work or services performed personally by the party. This applies chiefly to sect. 1 (2). Sect. 1 (5) provides that insurance moneys shall be left out of account. Sect. 1 (6) provides (to paraphrase it) that the court may allow the action under sect. 1 (3) to be brought against P_1, the other party to the contract, even though the benefit was conferred not upon him but upon P_2, another party to the contract, or upon X, a person who was not a party to the

[2] Official Report, 29th June, 1943, col. 141.

contract at all. Sect. 2 (2) makes the Act bind the Crown; sect. 2 (3) makes the Act subject to agreement to the contrary; sect. 2 (4) saves the common law as to severable contracts; and sect. 3 declares that the expression "court" shall include an arbitrator.

There are certain general restrictions upon the scope of the Act. They are as follows—

(i) The Act applies only where the contract under which the payment was made or benefit conferred was governed by English law—i.e., where the proper law of the contract was the law of England (see sect. 1 (1)).

This provision seems to be unfortunate. The effect is to introduce into an Act dealing with the English law of contracts a provision relating to the English system of conflict of laws. A minor criticism of it is that as drafted the provision is incomplete, for it does not state what system of law is to be applied by English courts to a contract the proper law of which is, say, French. Presumably, it is intended that French law shall be applied, but the Act does not say so. Much more serious is the objection that the draftsman of the Act has hit upon a rule that would not command support from most specialists in the field of conflict of laws. The question was fully considered in a valuable article by Professor Gutteridge and Dr. Lipstein (7 Camb. L.J. 80), and it is clear from their discussion that the weight of opinion among conflict-of-laws lawyers would prefer the law of the place where the benefit is conferred, or where the enrichment takes place, as the law to be applied in the situation dealt with by the Act. This is the rule chosen in the American *Restatement of the Conflict of Laws* (sects. 452, 453), and it is a pity that English law should now become different.

(ii) The Act applies only where the contract "has become impossible of performance or been otherwise frustrated" (see sect. 1 (1)). The result is that a rule analogous to the rule in *Appleby* v. *Myers* still continues to apply where the failure to complete the contract was a breach of contract on the part of the partial performer (see *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673). It is to be hoped that the attention of the legislature will one day be turned to this latter rule.

(iii) The Act applies only if the "time of discharge" is on or after 1 July 1943 (sect. 2 (1)).

(iv) By sect. 2 (5) the Act does not apply—

> "(*a*) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or
>
> "(*b*) to any contract of insurance, save as is provided by subsec. (5) of the foregoing section; or
>
> "(*c*) to any contract to which sect.7 of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished."

The effect of (*a*) is to preserve, with the exceptions therein mentioned, the common law as to prepaid freight and *pro rata* freight; this follows a recommendation of the Law Revision Committee. Paragraphs (*b*) and (*c*) were not suggested by the Committee, and it is puzzling to know why these contracts were excluded from the Act.

The Act, although short, raises a considerable number of legal problems, which it has not been possible to discuss in the space of a note.

G. L. Williams.

NOTES OF CASES

Silence as Admission of Guilt

The decision of the Court of Criminal Appeal in *R.* v. *Leckey*, [1944] 1 K.B. 80, raises two points of considerable interest. The first concerns the rule that reservation of the defence in answer to an accusation of crime is not evidence of an admission of guilt. This rule is founded upon the fundamental principle that the burden of proof which rests on the prosecution cannot be discharged by the adduction of evidence of ambiguous character; it acts as a protection against close questioning by the police and guarantees the right to legal assistance. When exercised in the preliminary examination it expresses the character of these proceedings, concerned solely with the question whether a *prima facie* case has been shown by the prosecution, and provides legitimate and sometimes essential assistance to the defence in allowing time needed to collect the evidence with which to meet the charges, the precise nature of which may not have been disclosed before the preliminary examination.

It is thus not difficult to explain and justify the rule. The privilege to maintain silence, no less than other privileges, is, however, open to abuse. It enables the raising of surprise defences, especially that of an alibi, and to prevent this abuse the rule has been qualified in *R.* v. *Littleboy*, [1934] 2 K.B. 408, so as to permit observations in the summing up "with regard to the force of an alibi, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested."

The limits of the inroad on the rule made by this qualification are not easily determined, especially if, as Professor Goodhart points out in the January 1944 issue of the *Law Quarterly Review*, Vol. 60, pp. 34–5, the reasoning of *R.* v. *Littleboy* is not confined to alibi cases. Professor Goodhart suggests that the relation of the general rule to the exception established in the *Littleboy Case* is defined by the distinction between evidence and comment, the silence of the accused, although not available as evidence, being proper subject-matter for judicial comment. This explanation makes it difficult to reconcile the decision in the present case, in which the summing up was held to be defective because it contained such comments, with *Littleboy's Case*.

Moreover, Professor Goodhart's suggestion meets with the difficulty that a summing up should not contain comment unsupported by evidence. If comment on the silence of the accused implies that such silence affords some evidence of an admission of guilt, *Littleboy's Case* must be taken as establishing a relaxation of the general rule that silence does not provide evidence of an admission. The degree to which the general rule has been relaxed can be measured by the purpose of this qualification of the rule, namely the prevention of abuse of the privilege to reserve the defence. If judicial comments on the silence of the accused are tested by the presence of a danger of such abuse, the difficulty experienced by Professor Goodhart in reconciling *R.* v. *Leckey* with *Littleboy's Case* disappears.

Leckey was charged with the murder of a cinema usherette at Folkestone. A considerable amount of circumstantial evidence was produced by the prosecution. The summing up of Singleton, J., contained three pointed references to the fact that the accused, when cautioned, refused to make a statement before consulting a solicitor. The defence raised at

the trial was not an alibi, nor, it seems, such as would have enabled the police to investigate it if disclosed earlier, and, although this does not appear clearly from the judgment of the Lord Chief Justice, the accused or his legal adviser did not disclose it at the preliminary examination. In the circumstances, Singleton, J., could only comment on the accused's failure to protest his innocence and on his coolness in the face of a charge of murder.

The reason given by the accused for his silence was, at any rate superficially, plausible. His conduct of the defence seems to have been approved by his advisers. His behaviour, if clearly betraying his guilt, should have been left to speak for itself; if equivocal, it would have called for psychological interpretation beyond the scope of a summing up. In fact, the summing up was concerned with the absence of protestations of innocence rather than the failure to disclose the defence. The reservation of the defence did not constitute an abuse of the privilege to maintain silence and Singleton, J.'s, comments, therefore, clearly exceeded the limits laid down in the *Littleboy Case*.

Despite these defects in the summing up the conviction appeared fully justified by the evidence and the appeal seemed to fall within the terms of sect. 4 (1) of the Criminal Appeal Act, 1907, which allows dismissal of an appeal if the defect established did not produce a substantial miscarriage of justice. This argument was rejected and this provides the other point of interest raised by this case.

The Court of Criminal Appeal in the present case felt constrained to adopt the interpretation of the section given by the House of Lords in *Woolmington* v. *D.P.P.*, [1935] A.C. 462, at p. 482. In that case, Lord Sankey, L.C., refused to apply the section on the ground that it could not be said that the jury, if properly directed, would nevertheless have convicted. To assert that every misdirection produces a miscarriage of justice unless it can be said that the jury, if properly directed, would have inevitably come to the same conclusion nullifies, as Professor Goodhart explains, the effect of the section and defeats the objects of the legislature. He thinks that the existing mischief of unjust acquittals should be remedied by granting to the Court of Criminal Appeal a discretion, not allowed to it at present under the concluding words of sect. 4 (2), of ordering a new trial after quashing a conviction. It may perhaps be added that reform might be confined to abrogation of the unfortunate interpretation of sect. 4 (1) given in *Woolmington's Case*, either by treating the remarks of Lord Sankey as *obiter dicta* for which—as Professor Goodhart points out—there is some justification, although Lord Sankey's observations in *Woolmington's Case* appear to be founded on his earlier remarks in *Maxwell* v. *D.P.P.*, [1935] 300, at pp. 322 ff., or through a brief amendment of the Criminal Appeal Act.

J. UNGER.

Right of a Wife to claim Money saved from a House-keeping Allowance

The case of *Blackwell* v. *Blackwell*, [1943] 2 All E.R. 579, is one more instance of the truth of the old adage that "in law the husband and wife are one, but the husband is the one." In it, the Court of Appeal unanimously upheld the claim of a husband after separation to moneys saved from a housekeeping allowance made to the wife while the parties were living together.

Though the decision may be good law, it is questionable whether its continued existence is good justice. Its critics fall roughly into two classes: (*a*) those who, asserting that the law has now openly recognised that a wife's position may be, unless the husband chooses otherwise, no better than that of an unpaid servant, demand that the rule should be altered by legislation along the lines of a statute providing that the residue of earned income after the expenses of maintaining a home have been deducted should belong jointly to the husband and wife; and (*b*) those who, while not denying the hardship of such a rule, argue that the matter must and should be settled by the spouses themselves. In their opinion it was good sense and also good law which prevented the Court from interfering in a matter which is in its essence purely personal and domestic.

There is more than an element of truth in both these views. Marriage is not a commercial contract and a wife does not expect to be paid for what she does "out of natural love and affection" in managing and running the home. Yet it is a partnership to the success of which each makes a contribution, and the principle is well recognised in law that in an undertaking where one party provides working capital and the other special skill or knowledge, both are entitled to share in the profits.

To those who maintain that such an arrangement ought to be the concern of the parties and not the legislature, no one would deny that such matters are better settled in such a way, and in the great majority of cases this does happen. At the same time it is pertinent to ask whether they consider the law's incursion into other matrimonial matters—notably the Married Women's Property legislation and the Divorce Acts—has had a deleterious effect on marital relations. If public opinion sanctions the intervention of the law to dissolve a union where the parties have failed to make it work, there is little force in an argument which insists on the continued economic inequality of a wife simply because it is considered inexpedient for the law to interfere. Moreover, they would do well to remember the observation of Goddard, L.J., at p. 580 that even a domestic arrangement dealing with a matter of this nature may not result in a legally binding agreement (*Balfour* v. *Balfour*, [1919] 2 K.B. 571), since the efficacy of such an arrangement will only be questioned when it has already ceased to work to the satisfaction of both parties.

It is obvious that the topic under discussion is only a small part of the much more important question of the economic status of women as a whole, but one or two comments suggest themselves. We are repeatedly told that the backbone of the National Savings Movement is the small investor, who is, in most cases, the housewife who makes a regular weekly contribution to a street group—presumably from money allowed to her for housekeeping purposes. It is legitimate to wonder whether she would be as enthusiastic were she to realise that her claim to a share in the certificates is a matter of grace on the part of her husband. Further, post-war credits assessed on the income tax payable on the earnings of husband and wife have been stated to belong to the husband. But the whole question of income tax is unsatisfactory—the fact that a husband and wife who are both earning are penalised in comparison with two unmarried people, should, one would have thought, have aroused strong comment from those who are concerned with what they consider to be a general lowering of moral standards.

With the total mobilisation of woman power during the last few years, an increasing number of married women have been, for the first time,

economically independent of their husbands. It is hard to believe that after the war they will readily return to such a situation as has received judicial recognition in *Blackwell* v. *Blackwell*, and on which, surprising as it may seem, the Court had no comments to make.

A writer in the current number of the *Law Quarterly Review* has doubted whether a law embodying the suggestion outlined above would meet with public approval. If this is so, then it is high time the law abandoned its traditional place and sought to mould rather than lag behind public opinion. It is disturbing to find such a view prevailing in these days of so-called enlightened equality of the sexes, and with great respect it is submitted that it is neither just nor expedient to insist on the continued economic inequality of the wife in an institution which is the basis of the whole of our social structure.

ISOBEL MATSON.

Separation of Powers in Company Law

The extent to which the basic principle of "separation of power" is inherent in the constitution of a limited company was clearly demonstrated by the decision of Lord Clauson in *Scott* v. *Scott*, [1943] 1 All E.R. 582. That certain aspects of company management are reserved to the "legislative powers"—the shareholders' meeting—is elementary, but the decision under review shows that an attempt made by the "legislature" to encroach upon the sphere reserved to the executive is as unavailing as any measure taken by the directors to usurp the functions of the meeting.

Table A, Arts. 89 and 90 (95 and 96 of the 1908 Table) distributes, as between directors and meeting, the various functions which may fall to be exercised in connection with the declaration of dividends. The declaration of a final dividend is a "legislative" function, but the fixing of a maximum for the final dividend as well as the declaration of an "interim" dividend belong to the sphere of the "executive." Moreover, Art. 67 (Art. 71 of 1908) contains two overriding principles. It declares the "management of the business" to be an executive function, and it establishes what in constitutional law might be termed a "presumption of competence." All powers of the company which are not specifically allocated to the meeting are to be exercised by the directors, so, however, that—within the framework of the company's constitution contained in the Act and in the articles—the meeting may, by a simple resolution, transfer specified functions to itself.

In the case under review, which was a family dispute under the guise of a constitutional crisis within a private company, the meeting decided that the holders of the 15 per cent cumulative preference shares were to receive a "weekly payment . . . of $\frac{1}{52}$ of 15 per cent on the capital for the time being paid up on the preference shares . . . by way of advance (without interest) pending the declaration and payment of the dividend . . . for the current year." The weekly payments were to be deducted from the final dividend, or repaid to the company within one month after demand if the final dividend fell short of the total sum paid out by weekly payments. Lord Clauson held this resolution to be "wholly inoperative," on the ground that it was an encroachment upon the functions of the directors. It was either—despite the clause as to repayment—the declaration of an interim dividend, or, if it was, as claimed by those who supported it, a direction to pay certain loans, an interference with the

directors' powers of management. That power includes the management of the company's financial affairs. "A resolution . . . which directs the directors to make certain loans is a most obvious interference with the very root of that which is committed to the directors, namely the management of the business." Nor could the resolution be saved by a reference to the *clausula generalis* in Art. 67. The right to transfer by resolution a function from the executive to the meeting has no application to the "management of the business." In order to allocate to itself a power of management the meeting would have to change the articles, i.e. pass a special resolution and act—if we may again borrow a phrase from constitutional theory—as "*pouvoir constituant*" and not simply as "*pouvoir législatif.*"

The same was true of a resolution by which the meeting purported to instruct a firm of accountants "to investigate the financial affairs of the company" for the two last preceding financial years, "to report to the company thereon as soon as practicable and prepare any fresh accounts which they may consider necessary." It is, of course, within the powers of the meeting to order an investigation, but this power can—by Sect. 137 of the Act—only be exercised by special resolution. In doing so the shareholders interfere with the management of the financial affairs of the company. Sect. 137 breaks through the scheme of "*séparation des pouvoirs*," but it requires the qualified majority which is characteristic of the exercise of the constitution-making power. As it stood, the resolution in the case under review was inoperative, an unwarranted interference with the financial management.

The case was, as Lord Clauson said, "an easy one," but it stands out as a characteristic expression of the modern tendency to safeguard the continuity of the business management, if necessary by prescribing narrow limits to the shareholders' rights.

O. Kahn-Freund.

Contract—Implied Term—Restrictive Covenant Running with Chattels

It is perhaps fortunate that the Court of Appeal in *Greenhalgh* v. *Mallard*, [1943] 2 All E.R. 234, did not have to pronounce upon the decision in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*, [1926] A.C. 108, for had they done so they would apparently have disapproved it, and so have helped to deprive English law of a hopeful line of development. The facts of the instant case were that three directors of a company agreed with the appellant, a shareholder, to vote with and support him. Afterwards the three directors sold most of their shares, with the result that the appellant lost control of the voting power. The purchasers had notice of the agreement. It was held that no term could be implied in the agreement to the effect that the directors would not sell their shares, and that the undertaking to vote applied only to shares that the contracting parties might happen to have available. This being so, no question arose as to the purchasers of the shares being bound in equity by an implied negative agreement not to vote against the appellant. Of the argument that they were bound, which was based upon the *Lord Strathcona* case, Lord Greene, M.R., said: "Those whose memory enables them to go back to the time when that case was decided will remember that some of the observations made in relation to constructive trustees and the running of restrictive

covenants with personalty were regarded by the profession as novel if not revolutionary. The decision was based on what had been said by Knight Bruce, L.J., in *De Mattos* v. *Gibson* (1859), 4 De G. & J. 276, 284. If and when the matters discussed in *Lord Strathcona S.S. Co.'s* case have to be considered by this or any other court, it will be necessary to give them a very close examination. It may be relevant, if that case arises, to note that the observations of Knight Bruce, L.J., were made on an interlocutory motion. The other member of the court, Turner, L.J., refused to make any pronouncement at all upon the subject; and when after the trial of the action the matter came before Lord Chelmsford on appeal, he dealt with it without any reference at all to the views which Knight Bruce, L.J., had expressed." To this it may be replied, with respect, that although the *Lord Strathcona* case may have been criticised over the teacups in the Inns of Court in 1926, those who have put their opinions into print have been on the whole favourable. Thus the decision was supported by Dr. Wade in (1928) 44 L.Q.R. 51, the editors of Anson (eighteenth edition, 260–1), Holdsworth in (1933) 49 L.Q.R. 579–80, and Professor Winfield in his *Province of the Law of Tort* 106; and it was at any rate not condemned by Professor Gutteridge in (1935) 51 L.Q.R. 98, and by the editor of Ashburner (*Equity*, second edition, 372). Moreover, if transatlantic opinion is of interest, it was supported by Professor Chafee in (1928) 41 H.L.R. 962–7, and by Mr. McInnes in (1930) 8 Can. Bar Rev. 304. The only critics of the decision on the actual facts seem to be the editors of Smith's *Leading Cases* (thirteenth edition, 97–8) and Mr. Hanbury (*Modern Equity*, third edition, 37), and their criticism is simply that it is inconsistent with the previous authorities, not that it is undesirable. If the principle of the case ever comes before the Court of Appeal it may be that the Court of Appeal will feel itself bound by these previous authorities to dissent from it (see *Clore* v. *Theatrical Properties*, [1936] 3 All E.R. at 490–1), but it is to be hoped that this course will not lightly be adopted.

GLANVILLE WILLIAMS.

Contract—Private Carriers—Exceptions Clause

The decision in *Bontex Knitting Works* v. *St. John's Garage*, [1943] 2 All E.R. 690, is an illustration of the rather captious attitude adopted by the courts towards clauses purporting to exempt from liability for negligence. It might be thought that in these days of insurance such a clause should receive the construction that any ordinary person would put upon it; but the judges still maintain principles dating from a time when liability for negligence was regarded as a question of morality rather than of the commercial incidence of risk. In the *Bontex* case, the facts, so far as material, were that the defendants contracted to supply a van and driver to deliver the plaintiffs' goods forthwith to the latter's customers. The contract contained a clause exempting the defendants from liability for loss of or damage to goods on their van. On the occasion in question the job should have taken two and a half hours, but the driver, shortly after starting out, decided to take an hour off for refreshment. This was held by the learned judge, Lewis, J., to be a breach of his employers' (the defendants') contract. The driver left the van unattended during his absence without any precautions to prevent theft apart from removing the ignition key. When he returned the van had gone, and the plaintiffs' goods were never recovered. Lewis, J., held that the clause in the contract

exempted the defendants from liability for negligence, but that it did not exempt them from liability for breach of contract, the reason given for the latter ruling being that "for that purpose [*scil.* for the purpose of the clause] the contract was at an end, in the sense that it had been broken by the defendants themselves." The result was that the plaintiffs were entitled to recover the value of the lost goods.

This conclusion is, with respect, rather surprising. In the first place, it draws a technical distinction between liability for negligence and liability for breach of contract that would not occur to a layman who frames or reads such an exceptions clause. Second, the distinction is open to technical criticism, for there is not necessarily any antithesis between negligence and breach of contract. A breach of contract may be by negligence, and this one was. If it be decided that an exceptions clause is intended to protect from liability for negligence, it ought to protect whether the action for that negligence be framed in contract or in tort. The argument is not weakened even if the particular contract be held to have created a "strict" or "absolute" duty, for if the clause exempts from liability for negligence, it must *a fortiori* exempt from liability without fault. Third, the conclusion that because the defendants had broken their contract they had lost the right to rely on a clause in it seems to be inconsistent with *Heyman* v. *Darwins*, [1942] A.C. 356, where the House of Lords rejected this argument with regard to an arbitration clause. Of the argument that a contract is ended by the defendant's "repudiation," Lord Macmillan said (at p. 373): "Repudiation, . . . in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. . . . Even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. . . . The contract stands, but one of the parties has declined to fulfil his part of it." The other law lords expressed opinions to the same effect. Fourth, all contracts of carriage and contracts of deposit of goods in which the carrier or depositee is not strictly liable for the safety of the goods, contain at common law an implied term (unless excluded by the contract) that the carrier or bailee will use reasonable care. It is frequently attempted to exclude this implied term by an express clause excluding liability for negligence, but if the reasoning in the instant case is correct such an exceptions clause seems to fail of the desired effect. This is an astonishing conclusion, which, if correct, vitiates most of the "ticket cases." Finally, the decision is open to the practical objection that it seems to upset the expectations of the parties under contracts of insurance. Having regard to the wording of the contract it would have been natural for the plaintiffs to have insured the goods against loss or damage, and for the defendants to have refrained from doing so. Yet on the present decision, the plaintiffs' insurance company would be entitled as a matter of subrogation to recover the value of the lost goods from the uninsured defendants.

It is respectfully submitted that although the decision may possibly be supported as a matter of strict law, the ground upon which it can be supported is narrower than that stated by the learned judge. In the law of carriage of goods it is settled that deviation by the carrier prevents him from relying on exceptions clauses, except for loss that would have happened apart from the deviation; and it is also settled that delay may in some cases have the same effect as deviation (see *The Cap Palos*, [1921] p. 458, quoted by the learned judge, and also the other authorities cited in Scrutton on *Charterparties*, fourteenth edition, Art. 99, notes (*m*), (*n*)).

What delay is regarded as having the effect of deviation is not clear from these authorities, which are in a most unsatisfactory state; but at any rate they seem to supply a legal justification for the decision.

GLANVILLE WILLIAMS.

Animals—Escape on to Highway

The common law in this year of grace 1944 is in some ways a remarkable system. It still believes in highwaymen, with whom innkeepers are supposed to be in league, and it sees no difference between the lonely inn of former times and the modern hotel, with its hundred bedrooms, in a crowded town. Hence the survival of the innkeeper's strict liability for the loss of his guest's goods. It has not heard of artificial light. Hence the necessity for the landlord, in making formal demand for his rent, to do so between sunrise and sunset, in order that there may be sufficient light for the tenant to count out the coins. Hence, too, the necessity for a sale in "market overt" to be within the same hours. Finally, it is ignorant of the invention of wheeled vehicles and metalled roads; only thus can one explain the exemption of landowners from a duty to prevent their animals from straying on the highway.

The last rule was approved by the Court of Appeal, in the early days of motoring, in *Heath's Garage* v. *Hodges*, [1916] 2 K.B. 370. The fact that it has not been effectively challenged since may perhaps be explained (if one may borrow the words of Mr. Spencer Bower, who was speaking in another connection), "by the fact that, during these twenty-eight years, no litigant emerged who was either rich enough to carry the question with pomp and circumstance, or poor enough to carry it *in forma pauperis*, to the tribunal of ultimate resort, and by the absence of any statutory provision, such as Chitty, L.J., always advocated, enabling, in a proper case, any important question of law, on the certificate of a competent authority, to be taken to an appellate court at the expense of the State" (*Actionable Misrepresentation*, second edition, Preface). In *Hughes* v. *Williams*, 1943 1 All E.R. 535, the plaintiff had the resources to take the question to the Court of Appeal, which regarded itself as bound by its own previous decisions; the plaintiff's energy or money was then spent, and so we are left with the law as it was before. It is good to note, however, that all three members of the court expressed dissatisfaction with the state of the law, and they suggested that, if it was not sooner remedied by the House of Lords, it should be remedied after the war by legislation.

GLANVILLE WILLIAMS.

Employer's Duty to Provide a Safe System—Rule in Wilson's & Clyde Coal Co. v. English

The famous decision of the House of Lords in *Wilson's case* (1938), A.C. 57, has undoubtedly done much both to extend and to systematise the duties of employers regarding the safety of their employees. The result has been a great increase in actions based on Wilson's case.[1] Three recent decisions, all arising from accidents suffered by workmen working on stationary ships, give valuable applications and illustrations of the rule.

In *Speed* v. *Thomas Swift & Co.* (1943), 1 All E.R. 539, the plaintiff,

[1] Cf. Russell-Jones, *supra*, p. 21.

in the employ of the defendants, was injured while assisting in the unloading of the cargo. The accident occurred through a hook catching a broken rail which was neither protected nor removed during the unloading operations. Also the working of the port winch was defective, and a quantity of dunnage left on the deck. Both these factors increased the danger of the broken rail being picked up by the winch. The Court of Appeal found that the defendants had failed to provide "a safe system of working" in the sense of Wilson's case, and took the opportunity of analysing this formula more closely. Lord Greene, M.R., emphasised that, where the work is not regular and uniform, the laying down and observance of standard regulations will not necessarily suffice, but "what is a safe system can only be determined in the light of the actual situation on the spot at the relevant time." The layout may have to be modified in the light of special conditions under which the work is carried out. Both MacKinnon and Goddard, L.JJ., enlarged upon the distinction between the employer's failure to provide a safe system of working, either personally or vicariously —for which he is liable—and the failure to carry out the system properly through what Lord Wright in *Wilson's Case* termed "the casual negligence of the managers, foreman or other employees"—for which the employer is not liable.

The same problem posed itself for Atkinson, J., in *Garcia* v. *Harland & Wolff, Ltd.* (1943), 2 All E.R. 477, where the plaintiff's husband had been killed by tripping over obstructions on the deck, owing to insufficient lighting and falling down an open hatchway. The common law obligation of providing a safe system of work here acquired special importance, for the plaintiff failed in her claim, in so far as it was based on a breach of the Shipbuilding Regulations made under the Factories Act.

The learned judge found, after careful examination, that, contrary to the opinion of Stable, J., in *Fitzpatrick* v. *C. & H. Crighton* (1921), *Ltd.* (unreported) these Regulations did not apply in the present case. But the claim succeeded under *Wilson's case*. The defendants, as the deceased's employers, who had undertaken the job of providing a wiring system for the ship, had failed in their duty to provide a safe system of working. The foreman had not adequately covered the hatchway and failed to provide artificial light. For this negligence the employers were vicariously liable; it was not a case of casual negligence—as an instance of which Goddard, L.J., in *Speed's case*, had mentioned the master in personal charge turning his back or going to another job, and one of the men then removing the protection. Nor was Atkinson, J., impressed by the argument that the defendants were not in control of the premises. In *Taylor* v. *Sims* (1942), 2 All E.R. 375, contractors, employed to do first-aid repairs in bombed L.C.C. houses, wrongly not marked as dangerous, were rightly successful with this argument. But here it was not a case of the premises —the ship—being unsafe as such. It was a question of the system of work adopted by the defendants when working on premises belonging to other people. For that purpose, the defendants had control.

In *Ashworth* v. *McCruisk* (1943), 2 All E.R. 446, the duty in question was a statutory one. The Docks Regulations, 1943, provide for the employment of a signaller when a cargo is being loaded or unloaded by a fall at a hatchway. But as regards the interpretation of such duties designed to protect workmen, the difference between statutory and common law duties stands on the same footing (Lord Wright in *Wilson's case* (1938), A.C. at p. 84). The Court of Appeal held that, where a signaller

was present at the job at the commencement of the work, but not at the time of the accident, the duty was not discharged. Furthermore, though the burden of proof of the breach is on the plaintiff, insufficient evidence that the signaller was present at the time of the accident, was construed as evidence of non-compliance with the regulations. The Court thus resisted an indirect attempt, successful with the judge of first instance, to go back to the view once prevalent, but decisively rejected by *Wilson's case* –that delegation of the duty, by contract or otherwise, to a competent person, absolves the employer.

An interesting aspect of the decision in *Garcia's case* is the application of the new scale of values laid down in *Benham* v. *Gambling* (1941), A.C. 157, to the death of an expert electrician of 27 years of age, in good health and happily married. Atkinson, J., was fully aware of the desire of the House of Lords, in *Benham's case*, to deflate the excessive amounts awarded for loss of expectation of life; but he considered, on the other hand, the deceased's life as more valuable than that of a child's of 2½ years, and therefore awarded £500 as compared with £200 in the former case.

Two general reflections are prompted by the above decisions. In *Speed's case*, both MacKinnon and Goddard, L.J.J., reaffirmed the dislike of modern lawyers for the doctrine of common employment. MacKinnon, L.J., expressed regret that "by the exigencies of Parliamentary procedure, the House of Lords has had to pursue its instigating and ameliorative task by judicial decision rather than by legislation." Surely, the abolition of this doctrine can be regarded as "uncontroversial"; Labour certainly would not grieve for it, and, according to MacKinnon, L.J., "lawyers who are gentlemen" have also long disliked it. It would be a short and simple piece of legislation and it would do good out of proportion to the effort involved; for much strained effort and sophistry in the distinction of precedents, by the House of Lords and other Courts, has had to be devoted to the mitigation of a doctrine which the House of Lords cannot abolish, as long as it is bound by precedent. The other reflection is that, at a time when Social Security is in everyone's mouth, the Law Courts have quietly done effective work in providing a measure of social security in one limited, but important, field.

W. Friedmann.

Costs as Necessaries

The question raised in *King* v. *King*, [1943] 2 All E.R. 253, as to whether a wife has implied authority to pledge her husband's credit for costs in divorce proceedings was considered of such practical importance that it was argued before the full Court of Appeal. It was unanimously held that the Common Law rule that a wife has authority to employ legal help at the expense of her husband applied to require him to give security for her costs on an appeal by him against the dismissal of his petition for divorce. Scott, L.J., delivering the judgment of the Court, had no difficulty in holding that, though the practice of granting a wife security for costs had originated in the old Ecclesiastical Court, it had nevertheless continued to exist under Sect. 22, Matrimonial Causes Act, 1857—now Sect. 103, Supreme Court of Judicature (Consolidation) Act, 1925—despite the fact that a wife's position had subsequently been changed by the various Married Women's Property Acts. The Court expressly left open the question as to whether the same rule would apply in the case of a

wife's appeal against a decree of dissolution, though Scott, L.J., at page 254, said that in such circumstances 'the doctrine of a common law agency of necessity would seem excluded."

A second point raised by counsel for the applicant was based on the assertion that even if this doctrine of necessity were excluded for any reason (of which the above instance might be one), the granting of such security was necessary to secure the efficient conduct of divorce proceedings —a matter which is of considerable interest to the State in its function of protecting the marriage status. This suggestion was not discussed by the Court except in so far as Scott, L.J., remarked that public policy might enable the Court to exercise jurisdiction in such a case.

"Public policy," it has been said, "is an unruly horse and a dangerous one to ride," but it is submitted that in mounting it in such circumstances a court need not fear being unseated. Recent discussion over the hearing of divorce petitions has emphasised the care with which questions of such a nature should be investigated by the Courts. To refuse an application for security for costs in circumstances which might amount to a denial of a right of appeal to a wife who seeks to maintain a union, on the narrow ground that with the decree of dissolution the doctrine of agency is excluded, would ill serve the interests of the State which is, as counsel argued, concerned not with the dissolution but the protection of marital relations. Presumably this mediaeval doctrine of agency of necessity survives as a means of affording some slight amelioration of the wife's unequal economic status in law, but it may be asked whether a system which in some circumstances may depend for its efficient dealing with such a vital matter as divorce, on such a narrow and archaic principle, is not in urgent need of revision.

One last point may be mentioned. Two cases were cited by counsel for the appellant—*Shufflebotham* v. *Shufflebotham*, [1923] 128 L.T. 642, and *Vidal* v. *Vidal*, [1921] reported only in *The Times* of 13th October. Both were decisions of the Court of Appeal and both were in conflict. The present case was decided in accordance with the earlier decision in *Vidal* v. *Vidal*, ordering security for the wife's costs, and *Shufflebotham* v. *Shufflebotham* is now presumably overruled. It seems strange that a decision of such practical importance as *Vidal* v. *Vidal*, which was moreover a decision of the full Court of Appeal, presided over by Lord Birkenhead, should have got no further than an abbreviated report in *The Times*, with the result that in *Shufflebotham* v. *Shufflebotham*, argued only two years later, it was presumably never even cited. That such a situation can arise, and this is by no means an isolated instance, compels one to ask whether our machinery for law reporting does not stand in need of drastic overhaul before our doctrine of precedent no longer justifies the esteem in which it is held both here and abroad.

ISOBEL MATSON.

The Enemy Character of Corporations

Enemy character, as it affects an *individual's* right to sue in the Courts, results from his residence in an enemy country and not from nationality (see *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, and *Rodriguez* v. *Speyer Bros.*, [1919] A.C. 59); enemy character for this purpose has been defined as "at common law" as contrasted with such character for the purposes of trading with the enemy or prize.

In line with a long series of similar decisions extending over the previous

thirty years, the House of Lords, in *The American Thread Co.* v. *Joyce* (1913), 29 T.L.R. 266, reaffirmed its earlier decision in *De Beers Consolidated Gold Mines, Ltd.* v. *Howe*, [1906] A.C. 455, to the effect that the residence of a company was in the country where its central control and management was situate, i.e. where its directors, who were the governing body of the company, met to exercise their powers and functions and where they managed and controlled the affairs of the company; incidentally it may be observed that this rule applies equally to companies incorporated in this country or abroad (cf. *Egyptian Delta Land & Investment Co., Ltd.* v. *Todd*, [1929] A.C.1). What, then, could be more natural than to hold, in time of war, that a corporation, even a British company, was resident for the purposes of enemy character in the country were "central control and management actually abided," [1906] A.C., p. 458? Yet when the House of Lords applied this rule in *The Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co., Ltd.*, [1916] 2 A.C. 307, it found that it had laid itself open to the charge of "originating a new principle in law" (49 L.Q.R., p. 341), of "violating the separate entity theory of corporations" (24 *Am. Jour. of International Law*, at p. 319), of "judicial legislation" (*ibid.*, p. 334) and of "piercing the corporate veil" (4 MOD. L. R., 167); Mr. Clive Parry, indeed, seriously doubted whether the *Daimler* rule was "good law" (*ibid.*, p. 168).

Lord Parker's judgment in the *Daimler Case* has become a classic, but its setting is not always appreciated without reference to the decisions on a company's residence which had culminated in the *American Thread Co. Case* (cf. *supra*). It was not until the *Daimler Case* was before the House of Lords that counsel relied on these revenue cases and it is the insistence in them of the place of control as constituting residence that gives the clue to the judgments of the Law Lords in the *Daimler Case* in similarly equating "control" with enemy character. To quote from Lord Parker: "In the case of an artificial person what is the analogue to voluntary *residence* among the King's enemies? . . . I think the analogy is to be found in *control*," [1916] 2 A.C., p. 339. The identity of reasoning is borne out even more strongly in the following extract from Lord Atkinson's judgment: "the full facts showing in what country the real business centre from which the directors operated . . . were never disclosed. These are, however, the very things which, for the purposes of Income Tax at all events, have been held to determine the place of residence of a Company, *De Beers, etc.* v. *Howe*, [1906] A.C. 455, . . . and I can see no reason why, for the purpose of deciding whether the carrying on by such a company of its trade does or does not amount to trading with the enemy, they should not equally determine its place of residence" (*ibid.*, pp. 318–9).[1]

It must, however, be observed that the rule laid down in the *Daimler Case* was only *obiter*, since the case was actually decided on a technical point of procedure. In *V/O Sofracht* v. *Van Udens Scheepvaart*, [1943] A.C. 203, the House of Lords had, however, squarely to face the issue whether residence was determinative of enemy character at common law equally for an incorporated body as for an individual, cf. *Porter* v. *Freudenberg, supra*. The facts in the *V/O Sofracht Case* were presented to the Courts with embarrassing economy; the respondents were a shipowning

[1] Those interested in a fuller justification of the rule in the *Daimler Case* are referred to the writer's recent work, *The Residence and Domicile of Corporations*, Ch. 4, s. B.

company incorporated according to the laws of Holland, with its registered office and principal place of business at Rotterdam; no evidence was adduced as to any change of head office or as to the place where its directors were resident or exercising their functions. At the date of the action the whole of Holland was occupied by the Germans; on this ancillary question it was held that Holland must rank as enemy-occupied territory for the purpose of attachment of enemy character to persons resident there, since the Germans were in effective control of the whole country (see *The Thirty Hogsheads of Sugar* (1815), 9 Cranch, 191, the reasoning in which was preferred by the Law Lords to Lord Kingsdown's dictum to the contrary in *The Gerasimo* (1857), 11 Moo. P.C. 88).

It was contended by the appellants in the *V/O Sofracht* that the test for the enemy character of a company at common law was its "commercial domicil" or residence; the respondents argued that allegiance was the true test and that, as Holland was an ally of this country, a company incorporated there could not acquire enemy character—it was also sought to distinguish the rules as to enemy character laid down for the purposes of trading with the enemy (cf. *In re Hilckes*, [1917] 1 K.B. 48) or prize (cf. *The Hamborn*, [1919] A.C. 993). Both the Lord Chancellor and Lord Porter expressly equated a company's "residence" to its "commercial domicil," viz. Lord Simon at 112 L.J.K.B., p. 35: "There can be no doubt that the respondent company must be treated as resident at Rotterdam; their commercial domicil was there. . . .," and Lord Porter at p. 51: "The result seems to be that its (the company's) residence or, as it has been called loosely but with sufficient accuracy, its 'commercial domicil,' is still to be found in Holland." In the result it was held that, *being resident* in enemy occupied territory, the respondent company was an enemy alien at common law and therefore barred from prosecuting, without licence of the Crown, an action in our Courts; the test for the enemy character of a company was expressly laid down as being the *same* at common law, for trading with the enemy or in prize. It is to be noted that the Law Lords did not find it necessary to define the 'residence' of a company; this was natural for they had repeatedly laid it down that "a company resided where its directors met to exercise their general control of its affairs," *vide* the three cases referred to above and *The New Zealand Shipping Co., Ltd.* v. *Thew* (1922), 8 Tax. Cas. 208 (H.L.). It may therefore be said, with confidence, that in a case where the issue was *expressly* before it, the House of Lords has affirmed the rule in the *Daimler Case*, though it may be doubted whether this approval extends to the fourth sub-head of Lord Parker's enunciation, where he appeared to attach some importance to the nationality or residence of a company's *shareholders*, as distinct from its directors, regarding the latter as under the control of the former, [1916] 2 A.C., at p. 345; in the *De Beers* and later cases the House of Lords had ignored the shareholders' position, holding that a company resided where its *directors* met to exercise their functions.

The learned writer of the article on "The Trading with the Enemy Act and the Definition of an Enemy," at 4 Mod. L. R., 169, suggests that the "control test" for enemy character is fundamentally unsound; it is submitted that an analysis of the cases referred to above rebuts his conclusion. Further, at p. 166 he states: "Thus a corporation registered in occupied territory would not, *per se*, be hostile," relying on *S.A. Belge des Mines D'Aljustrel* v. *Anglo-Belgian Agency, Ltd.*, [1915] 2 Ch. 407. In the light of the decision in the *V/O Sofracht Case*, this conclusion, too,

cannot be upheld. It should, however, be pointed out that in the *S.A. Belge Case* its affairs were controlled and managed, during German occupation, by a majority of its directors resident in London; agreeably to the decisions in the *De Beers* and other cases the *S.A. Belge des Mines, etc.*, had its residence, or "commercial domicil," in this country so that it would not have acquired enemy character.

The inescapable connection of "control" with "residence" also accounts for the recent decision in *The Pamia*, [1943] 112 L.J.P. 34. It was there held that a ship-owning company incorporated in Belgium escaped attachment of enemy character, though that country was wholly occupied by the Germans, because under a Belgian Order-in-Council it had effectively removed its head office from Antwerp to Pittsburgh, U.S.A., and had suspended the powers of its directors who were not resident in that latter country; it had also provided that all control over the company's affairs was to be exercised *solely* by directors resident and meeting in America. Applying Lord Simon's rule in the *V/O Sofracht Case*, Bucknill, J., held in the instant case that the company's "commercial domicil" was in America and not Belgium so that it had not acquired an enemy character; this decision is clearly agreeable to the rule in the *De Beers Case*, i.e. as the central control and management of the company was in America, it was resident there.

In conclusion it may be said that it has now, finally and authoritatively, been laid down that the residence of a corporation determines its enemy character, whether at common law or for the purposes of prize or trading with the enemy, and that residence depends on where "central control and management actually abides." It is interesting to note that the domicil *stricto sensu*, as contrasted with "commercial domicil," of a corporation is always in the country of incorporation, see *Gasque* v. *Inland Revenue*, [1940] K.B. 80, approving a similar decision, to the same effect, of Mr. Justice O. W. Holmes in *Bergner and Engel Brewing Co.* v. *Dreyfus* (1889), 172 Mass. 154.

A. Farnsworth.

Profit on Exchange—"Income" or "Capital"

A considerable body of opinion had long considered that, following the decision of Rowlatt, J., in *McKinlay* v. *H. T. Jenkins & Son, Ltd.* (1926), 10 Tax Cas. 372, profits or losses resulting from transactions in exchange, when carried out by trading concerns, were not of a revenue nature so as to be within the ambit of the Income Tax Acts, but represented "appreciation" or "depreciation" of capital; in this case lire were originally purchased in order to buy marble in Italy, but owing to a favourable turn in the rate of exchange, these lire were disposed of at a profit and in lieu further lire were bought later at a lower rate—it was held that the profit arose from a speculation and was therefore of a capital nature.

The appellants in *Imperial Tobacco Co. (of Great Britain and Ireland), Ltd.* v. *Kelly*, [1943] 2 All E.R. 119, were large buyers of tobacco leaf in U.S.A., where they maintained a buying organisation to finance which they exported substantial amounts of dollars each year before the war; such dollar currency was purchased in this country, but only for this purpose and never for resale by speculation; at the outbreak of war the company were requested by the British Government to stop further purchases of tobacco in U.S.A. and the resultant dollar surplus had to be sold to the Treasury under the Defence (Finance) Regulations, 1939—

owing to a rise in the rate of dollar exchange, the appellant company made a profit of some £600,000 on the compulsory sale to the Treasury.

The Court of Appeal rejected the appellant's contention that, following *McKinlay's Case*, the profit was a "capital" one and therefore not assessable to Income Tax. The determining factor, regarding the inclusion of the results of exchange transactions in the computation of profits for taxation, was held to be the *intention* with which the foreign currency was originally bought; if it was to carry out an intended commercial transaction, such as the purchase of consumable stock, then, any profit—however arising—would be of an income nature and chargeable. Foreign currency purchased in such circumstances was just as much a "commodity" as any physical stock since, likewise, its sterling value may vary from day to day. Once the revenue nature of the transaction is established, it is immaterial whether the sale of currency was voluntary or compulsory under the Defence Regulations, see *Inland Revenue* v. *Newcastle Breweries, Ltd.*, (1927) 43 T.L.R. 476 (H.L.). Leave to appeal to the House of Lords was refused despite a very strong argument that the instant decision was a reversal of an alleged long-standing practice of ignoring for taxation purposes these exchange profits or losses. Though *McKinlay's Case* was not expressly over-ruled, it was clear from the judgments in the Court of Appeal that it was not approved.

A. FARNSWORTH.

"Legal Evasion" of Taxation

Despite the current national emergency, which might have encouraged tax-avoiders to undertake a share of the common burden proportionate to their wealth, the civic vice of "legal evasion" of taxation continues to flourish; this despite the disapprobation of the Judiciary, as to which see the remarks of the Lord Chancellor in *Latilla* v. *Inland Revenue*, [1943] A.C. 377, noted at 6 MOD. L. R., 243. The decisions of the Courts on cases arising out of the provisions of the Income Tax code aimed at this evasion are not normally of much general interest owing to their highly technical nature, which is the inevitable result of the very complicated and sometimes obscure provisions of the relevant sections. In recent cases, however, some points of principle have emerged which are worth noting.

Sect. 18, Finance Act, 1936, is aimed at those cases where liability to income tax, which of course includes surtax, is avoided by means of transfers, and other arrangements, of assets out of this country; the section, however, becomes inoperative if the taxpayer can show to the satisfaction of the Appeal Commissioners that the transfer, etc., was effected "*mainly* for some purpose other than that of avoiding liability to *taxation*." In *Corbett's Executors* v. *Inland Revenue*, [1943] 2 All E.R. 218, it was held that the onus of proof regarding the purpose of the transaction was upon the taxpayer; to invoke the provisions of the section, it was not necessary for the Crown to establish that the main purpose of the transaction was the avoidance of taxation. Though the section occurs in the part of the Finance Act devoted to income tax, including surtax, it was held—in *Sassoon* v. *Inland Revenue* (1943), Tax Leaflet No. 1232—that the expression "taxation," in the proviso referred to above, required a liberal interpretation in favour of the Crown; accordingly a scheme devised to evade British *death duties* was held to be within the mischief aimed at by the section, though the particular scheme might be quite innocent as regards evasion of income tax.

Under the so-called "Company Sur-tax Code" (sect. 21, Finance Act, 1922, sect. 14, Finance Act, 1937, and sect. 15, Finance Act, 1939, are the more important sections), the Special Commissioners of Income Tax are given power to apportion, according to their discretion, the income of certain privately controlled companies among the members thereof, and certain other persons, in such a way as to render the income so apportioned chargeable to sur-tax upon the members, etc. The Court of Appeal held, in *Fendoch Investment Co., Ltd.*, v. *Inland Revenue*, [1943] 2 All E.R. 413, that the Special Commissioners were not restricted, in their apportionments, only to those members of a company who were on its share register *at the end* of the particular year of assessment; they could have regard to persons who were members of the company *at any time* during such year.

A. FARNSWORTH.

REVIEWS

BRACTONIAN PROBLEMS. Being the ninth lecture on the David Murray Foundation in the University of Glasgow, prepared, but not delivered, by H. KANTOROWICZ. With a short memoir of the author by DORIS M. STENTON. Glasgow: Jackson, Son & Co., 1941. **4s.**

Bracton's Roman learning (or his lack of it) has been in controversy for some generations, but this brilliant and fascinating brochure makes an entirely new approach to an old but crucial problem. Kantorowicz shows that much of the mishandling of Roman law is due to the corruption of Bracton's text. Obvious errors appear in all the MSS.; and yet on another page the same point will be rightly stated, again in all the MSS. It is therefore the archetype which is at fault; phrases are misplaced, omitted, misread. The author's application of the techniques of textual criticism (in which he has long been an expert) is a delight to watch. Readers with a taste for literary detection and for textual emendation will thoroughly enjoy this display by a master. They will not find all the points equally convincing, although some of them seem to us unassailable. The general thesis which emerges is that the archetype from which all the MSS. derive was prepared from Bracton's drafts by someone who was quite beneath so difficult a task, and blundered badly. We have often felt that Bracton's scrupulous care in his *Note Book* (which dealt with the law he administered all his life) was not consistent with the reckless mishandling of the less familiar Roman system which Maitland attributed to him. The author's suggestion that it was the scribe's and not Bracton's nonsense which confronts us, is very welcome.

The method has snares. There must be limits to conjecture. Nor will all the author's conjectures command assent (the suggestion on p. 42 that we read *maritali* for *mortali* is obviously wrong, for Bracton was thinking of such cases as *Note Book* 1718). There are two other important points. The author suggests 1230 as the date; this seems to us quite impossible in view of the physical structure of the *Note Book* MS. The other is an attack upon Woodbine, which the author would certainly not have left in its present form if he had lived to consult an English friend. It seems to us that Woodbine does well to eschew emendations; we must know the manuscripts before we emend them, and that is sufficient justification for postponing much of the commentary until the manuscript situation has been elucidated. This method will have the additional advantage of allowing the

editor to embody in the commentary his second thoughts provoked by Kantorowicz's masterly essay.

Since the above was set up, we have seen (through the kindness of a friend) the detailed criticism of Kantorowicz by Professor Woodbine in 52 Yale L.J., 428–444; it is an indispensable corrective on many important points. Dr. Schulz (59 L.Q.R. 172) has since shown that some of the seeming blunders in copying from Azo are attributable to Bracton having used Tancred—a reminder that the "nonsense" in Bracton can be matched by equal "nonsense" in the texts of eminent contemporary civilians. More studies are on the way, and we look forward to some lively exchanges which will greatly illuminate a very fascinating problem.

T. F. T. Plucknett.

A TEXTBOOK OF THE LAW OF TORTS. By P. H. Winfield, LL.D. Second Edition. London: Sweet & Maxwell, 1943. 8vo, xxxix and 744 pp. **35s.** net.

Professor Winfield's book, first published in 1936, has rapidly established itself not only as a popular textbook for law students but also as a standard work to be cited by the Courts. This dual welcome is due to the skill and clarity with which he has analysed the basic principles on which the various rules are based. He has used his knowledge of legal history not solely for the purpose of antiquarian or academic interest, but primarily to explain some of the apparent anomalies in this branch of the law. Moreover, by pointing out that some of the grounds on which these rules were originally based are now obsolete, he is able to suggest desirable amendments in the law. This is one of the features of the book which makes it so attractive to the better students, for they do not like to feel that the subject they are studying is ruled by the dead hand of the past, and is incapable of adjustment to the needs of the present day. This is certainly not the feeling which any of Professor Winfield's books can give to the reader, because there is no subject which he does not make exciting; even his chapter on the limitation of actions can be read without pain.

No part of the law has made such striking progress in recent years as has the law of tort, because both the legislature and the judges have been busy introducing alterations in the rules or in clarifying some of the unsettled problems. It has therefore been necessary for Professor Winfield to make a considerable number of changes in his text, but none of them can be said to be basic, for no case comparable to *Donoghue* v. *Stevenson*, [1932] A.C. 562, has been decided in the past eight years. Perhaps the most striking alteration can be found in Chapter I, where the author has modified his view concerning the foundation of tortious liability. In the first edition he accepted the theory that all injuries done to another person are torts, unless there is some justification recognised by law, but in the present one he agrees that "from a narrow practical point of view" (p. 21) there is a definite number of torts outside which liability in tort does not exist. He holds, however, that if the whole history of the development of the law of tort is taken into account the principle that unjustifiable harm is tortious will be found to be its basic idea. There will be few, we believe, who will quarrel with that view.

It is not possible to discuss here all the interesting additions which Professor Winfield has made in the new edition, but one or two comments may be suggested. On p. 39 he cites *Dann* v. *Hamilton*, [1939] 1 K.B. 509,

as an illustration of the difference between *scienz* and *volenz*, but in a footnote he makes it clear that he thinks that that case was wrongly decided. The distinction between the defences of *volenti non fit injuria*, *novus actus interveniens* and contributory negligence (pp. 40–44) is admirably drawn: although this distinction is from the practical standpoint of only minor interest at the present time, it will become of major importance if contributory negligence as a complete defence is abolished by statute as recommended by the Law Revision Committee.

An interesting question arises in regard to the rule in *Rylands* v. *Fletcher*. Professor Winfield says (p. 53) that the principle underlying *Nichols* v. *Marsland* (1875–1876), L.R. 10 Ex. 255, that an act of God is a defence, is unquestioned. Later (p. 55) he says: "Even nowadays no practical harm is done by the restriction of act of God to the rule in *Rylands* v. *Fletcher*, for inevitable accident, which is a defence to other torts, comes to much the same thing." But if act of God and inevitable accident come to much the same thing then there is not much left of the rule in *Rylands* v. *Fletcher*. The House of Lords in *Greenock Corporation* v. *Caledonian Railway*, [1917] A.C. 556, seemed to take the view that only something in the nature of a miracle was a defence.

In discussing the *Polemis case*, Professor Winfield says (p. 81) "that only the House of Lords can now disperse all the doubts that have arisen." These doubts have increased since the House of Lords decided *Bourhill* v. *Young*, [1943] A.C. 92, for three of their Lordships were careful to point out that the direct consequence rule had not as yet been adopted by the House.

In discussing the *ultra vires* torts committed by the servants of a corporation, Professor Winfield says (p. 119): "If I order my butler to assault you, he and I are ordinary joint tortfeasors; there is no question of vicarious liability. If a college orders its head-porter to assault you, the position ought to be the same way." With all respect, the learned author has stacked the cards in this illustration, for he has chosen an act which is probably *intra vires*, as the Master and Fellows of a college may order the expulsion of persons from the college premises. Moreover, a college is a charter corporation to which special rules apply. But if the directors of a hotel company should order the head-porter to publish a libellous criticism of Professor Winfield's book, would the company be liable? Would not a Court hold that literary criticism was no part of the function of a hotel company?

Century Insurance Co., Ltd. v. *Northern Ireland Transport Board*, [1942] A.C. 509, has made it necessary to make a number of alterations in the section on Master and Servant. If the chapter were being written *de novo* it would be more logical to place the leading case at the beginning rather than at the end, but this would have meant more of a change than was possible in a new edition. Perhaps it would have been better to transpose *Williams* v. *Jones* (1865), 3 H. & C. 602, to a footnote, as this case must now be considered to have been overruled.

Professor Winfield says (at p. 208) that many of the actions brought under the Law Reform (Miscellaneous Provisions) Act, 1934, relating to loss of expectation of life, are of the "gold-digging" type. It is true that this Act enables a parent to recover damages in a roundabout way for the death of his child, but we should hardly describe such an action as "gold-digging." It is to be hoped that when the law is amended on this point, that the justifiable claims of parents will not be forgotten.

The section (p. 247) dealing with intentional physical harm other than

trespasses to the person is of great interest. Is this a new tort, or is it merely a particular way of committing the tort of negligence? In *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, and in *Janvier* v. *Sweeney*, [1919] 2 K.B. 316, the emphasis was on the fact that the acts were wilfully done, but it is not certain that the principle does not cover a wider field. Moreover, it is true only in a limited sense to say that the physical harm was intentional, for although the acts themselves were intentional in both cases, there was no evidence that the defendants intended the plaintiffs to become ill.

Section 91, dealing with possession, is perhaps the least satisfactory in the book, but this is probably due to the nature of the subject-matter itself. Some of the sentences may be slightly misleading to students. Thus, on p. 336 it is said that "it may be that neither of the rival claimants to an article has any right to possess: if so, neither has possession," and on p. 342 the possession by a thief seems to depend on the acquiescence of the person robbed, but possession in law does not depend either on right or on consent.

Wringe v. *Cohen*, [1940] 1 K.B. 229, is believed by Professor Winfield to place "too heavy a burden on landlords," on the ground that the case had nothing to do with a highway. But this distinction between private and public nuisances seems to ignore the fact that that distinction was disapproved by the House of Lords in *Sedleigh-Denfield* v. *O'Callaghan*, [1940] A.C. 880.

Crofter Hand Woven Harris Tweed Co., Ltd. v. *Veitch*, [1942] A.C. 435, has made it necessary to rewrite in large part the chapter on conspiracy because, although this case has introduced no new law, it has cleared up a number of doubtful points. Perhaps such cases as *Allen* v. *Flood* and *Quinn* v. *Leathem* might now be relegated to the footnotes, for they can only serve to confuse the student.

Professor Winfield's useful contrast between nuisance and negligence (p. 516) is neatly illustrated by the recent case of *Ware* v. *Garston Haulage Co., Ltd.*, [1943] 2 All E.R. 558, which shows how important this distinction may prove to be in practice.

On p. 598, *Daniels* v. *White & Sons, Ltd.*, [1938] 4 All E.R. 258, is referred to with approval, but to tell a consumer who has swallowed carbolic acid, disguised as lemonade, that he cannot recover because the manufacturer's process was "fool-proof," has always seemed to us to be adding insult to injury (see note in (1939) 55 L.Q.R. 6–9).

Professor Winfield accepts the decision in *Otto* v. *Bolton*, [1936] 2 K.B. 46, but he believes that the law ought to be altered by statute. If we may say so, we agree with every word of his convincing argument, and we hope that the Law Revision Committee will be given an opportunity of considering this point in the near future.

Finally, there is the chapter on tort and contracts, especially in relation to the measure of damages. Professor Winfield believes that there is a basic difference between the two concerning the remoteness of damage, as the rule in *Polemis* applies to tort but not to contract cases. As we do not believe that the rule in *Re Polemis* applies to either, we cannot agree with the conclusion he reaches. Certainly *The Argentino*, (1889), 14 App. Cas. 519, which he cites, seems to assume that there is a common law measure of damages applicable to both branches of law. Of course in making a contract the parties can agree to extend or to limit the common law measure, but apart from that we believe that the same rule applies.

The only criticism we have to make of Professor Winfield's book is that the general index is inadequate. Recently we wished to write a note on *Holdman* v. *Hamlyn*, 1943 K.B. 664, which concerned the injury of an infant by a fellow-servant. We naturally consulted "Winfield," but could find no reference to the point under infant, child, or minor, and no mention at all of fellow-servant. We finally remembered to look under Common Employment, where there was a reference to "volunteer" which led to the cases we wanted. A book which is now a standard one ought to be equipped with better apparatus so that those who wish to consult it can do so without unnecessary difficulty.

A. L. GOODHART.

THE CRISIS OF THE NATIONAL STATE. By W. FRIEDMANN. Macmillan. pp. ix + 197. **12s. 6d.**

This book merits the closest attention. That is so for two reasons. The first is not so much that its principal theses are new as that they are collected and emphasised in a manner that is both original and salutary. The second is that since the task of constructing an order of world society which shall be based upon the recognised fact of the practical supersession of the nation state, an order which shall replace the international anarchy of national states, is upon us, this task makes the study of the ideas which Dr. Friedmann examines a matter of present urgency. As he says, "The destruction of the Nazi empire will emphasise, not destroy, the need for reconstruction on Continental lines." It is one of his chief aims to show that the strength of forces making for compact supernational units proves the national state to be inadequate as a basis for political, military and economic power. If we take the problem of government as the practical problem it really is, we see this straining of many different forces after the creation of a larger unit as an attempt to restore a workable relationship between space, which has dwindled with the development of twentieth century means of transport and communication, with a workable area of authority. It is not new to insist that the national state belongs to the stage-coach era, but it is valuable that this should be emphasised now. Dr. Friedmann properly asserts that acceptance of national sovereignty "means the fundamental impossibility of an international, legal, political and economic order, as distinct from temporary balance of power." The end of a workable system for Europe based on a balance of power concept is marked by the emergence of a Germany able to withstand the whole of the rest of the Continent, and nothing that can be done by way of disarmament alone can offer, on such a basis, more than a temporary lull in a conflict bound to re-open when the lessons of its last phase have faded sufficiently from the memory.

Dr. Friedmann speaks of the "Fascist International" as further evidence of the supersession of the national state. He adds that "the power visions of Nazi leaders are international, not national." There is a certain danger in his use of the word "international" here. Nazis and Fascists have taken as one of their first tasks the destruction of internationalist thinking within their own countries, and have made a bonfire of works suggesting the existence of or the need for international unity. It would be a mistake, which Dr. Friedmann would be the first to recognise, to confuse the "international empire" of the Nazis, built on a tyrannical hierarchy within one country, spreading through the doctrine of racialism into contiguous countries and carried there by Panzer divisions, with the

basically humanitarian ideology of a true internationalism. It is, of course, true that Hitler, like other imperialists before him, uses the national state in the endeavour to create a hegemony, essentially international in that it includes subjected countries. But that is not internationalism in the normally accepted use of the term, nor is it exactly a new phenomenon.

Dr. Friedmann's examination of the development and conjunction of the two concepts, the state and the nation, is of peculiar value. The idea of the nation state as adopted by the middle class is properly understood only relatively to its nineteenth century background. The twentieth century form of the same evolution is to be seen in the federal tendency expressed, for example, in Latin America and in the Arab aspirations of the Middle East. But it is essentially a spearhead of attack, a means of achieving particular and limited purposes, and a means already inadequate or out of date. That the nation state, with its concomitants of sovereignty and state equality, is an inadequate mechanism for securing that freedom within certain areas of cultural and social endeavour, so far as *small* states are concerned, is surely too obvious to require argument. Yet its recognition even by refugee governments of the small countries is scarcely to be found; and the recent remarks of the Mexican Foreign Minister stand out in sharp and encouraging contrast. "States," he wrote, "will invariably revert to inequality so long as there does not exist a higher agency which is able to curb the stronger in favour of the weaker. . . . In enforcing international law, that agency would not curtail any sovereignty; it would only co-ordinate it with other sovereignties."

Having shown that the middle class first adopt the nation state as a useful instrument for securing their own purposes, and then to-day tend to discard it, Dr. Friedmann examines the attitude of what may be variously called the working class, labour, or the common man. He finds an adoption here, but with less enthusiasm, of the instrumentalities of the nation state. But he leaves the reader asking himself the question whether, as they move on from the earlier internationalist ideals of socialists, who acted without the immediate prospects of achieving power, they are now, as state power comes increasingly into their hands, in the process of tying themselves down to the limits of an instrument already out of date. Are trade unions, for instance, likely to be so enamoured of the prospects of using the state to secure their own limited domestic ends as to be in danger of failing to see that it is no longer an efficient instrument even for that limited purpose?

Dr. Friedmann has performed the invaluable service of providing us with a compact introduction to an essential study of the supernational mechanisms necessary for the world of to-day. Let us by all means be done with what he calls "the spurious formulas about respect for international law," the "smoke-screen" erected to obscure the anarchical realities of a world in which the crisis of the national state is the most immediate problem of every citizen.

H. R. G. GREAVES.

INTERNATIONAL LAW AND TOTALITARIAN LAWLESSNESS. By GEORG SCHWARZENBERGER. Jonathan Cape, Ltd., 1943. **10s. 6d.** net.

In his most recent book Dr. Schwarzenberger has undertaken the defence of International Law. Not merely points of doctrine, as he sees the matter are under attack but the basic conception of International Law itself.

Assaults come from two directions. In the first place, Nazi theory and practice are, as Dr. Schwarzenberger has no difficulty in showing, radically hostile. The whole idea of a master-race, and of master individuals within that race, is incompatible with the existence of Law. When Hitler announced his willingness "to sign anything" he made it clear that no agreement was, or could be, binding upon him; the professional jurists of the Reich hastened to supply theoretical justifications of this demand for an unlimited right to commit fraud. They continued to use the phrase "International Law" but it is obvious that they used it merely with intent to deceive. However, most people do not to-day need to be convinced that Nazism is—to parody Mr. Gladstone a little—"the negation of law erected into a system of government." The major interest of Dr. Schwarzenberger's defence is in his consideration of critics of another class.

Some writers, when faced with the anarchy let loose upon the world by the Axis Powers, have concluded that International Law itself has been the first victim of "the resolution of destruction." To admit this is, as Dr. Schwarzenberger sees, to admit the criminal's claim that he can not only break the law but abolish it. Such a surrender is as rash as it is unnecessary, for Law will exist so long as there are men ready to obey and to defend it. The argument by which Dr. Schwarzenberger meets the impatient and the faint-hearted is the strongest part of the book.

The author holds, with the best strategists, that attack is the strongest defence. He is not content to repel critics; he is determined to show the value of International Law in a positive manner. This he does by demonstrating how the conception of outlawry can be applied to the Axis Powers, and the practical consequences that can be deduced from such application. The argument here is very close, and a summary would do it injustice; the present reviewer must be content with holding that Dr. Schwarzenberger has amply proved his point.

In brief, *International Law and Totalitarian Lawlessness* is a powerful piece of work, alike in its criticism and its positive affirmations. Learning and logic have gone to its making in equal measure.

SYDNEY HERBERT.

DELINQUENCY CONTROL. By LOWELL JULLIARD CARR, *Assistant Professor of Sociology, Director of Michigan Child Guidance Institute, University of Michigan.* Harper Brothers, New York and London. xiv + 447 pp. **$3.50.**

It is, in the author's words, the purpose of this book "to provide a handbook for students, social workers, court officials, and civic leaders who may be interested in reducing juvenile maladjustments as one step toward more effective control of crime." The basic idea is that a social problem of this magnitude can be solved only by a combination of four things: "scientific research, specialised adjustive and preventive techniques, the art of social action, and the art of social organisation." To them are, therefore, the four principal parts of the book devoted. There is, first, the need for research and for a scientific technique. It is not without reason that the author deplores the prevalent tendency to master questions of social control with "mythology and hocus pocus": "To control pneumonia or to span the Golden Gate we use scientific methods. To control crime we use any scheme that happens to appeal to business men, women's clubs, and politicians in their spare time." "We" meaning the U.S.A., but actually applying to most other countries as well. To deplore this

state of affairs is, however, not good enough, and the author now turns to the question: "Is science ready" to take the place of "the Ox-cart on Main Street" and of the "Myth-mind in an Engineer's World"? The technique may exist, but "techniques do not apply themselves"—social action and organisation are needed to create a certain stage of willingness to use the existing tools. It is useless, for example, to offer facilities for psychological treatment to education authorities or heads of reformatory institutions who are not yet prepared to admit that they have any "problem children" under their care.

The techniques for the control of juvenile misbehaviour are treated under four heads: techniques of Discovery, of Diagnosis, of Treatment, and of Prevention. The techniques of Discovery are concerned with three—not mutually exclusive—types of children: delinquents, behaviour problem cases, and children in danger through high risk situations such as poverty, dangerous occupations, etc. The author estimates the approximate number of American children who belong to any of these categories at 9,000,000 out of 45,000,000, or 20 per cent of all, i.e. 9,000,000 children with a "delinquency expectancy considerably above the average." This is the reservoir which supplies the 200,000 delinquents who actually reach the American Juvenile Courts each year. It is obviously of paramount importance to identify and to treat these 200,000 children before they have become delinquent, and it is for this reason that the most valuable chapters of the book are devoted to the problem of Prevention.

The history of this problem, with which the author is not concerned, reveals many considerable differences of opinion as to the scope of the term Prevention, and the criminologist soon finds himself involved in theoretical and practical difficulties: Where is, for example, the line of demarcation between the treatment of actual and the prevention of future delinquency? And where the distinction between specific measures of preventing delinquency and general measures of social reform? There are writers whose preventive programme covers the whole range of social and economic reform, and others who demand that the criminologist should tackle only those evils which have an immediate and direct bearing on delinquency. This is not the place for a detailed discussion of such questions. The author himself seems to favour a fairly broad and comprehensive interpretation of the preventive tasks of deliquency control. There is hardly any form of social activity that has not to play some part in his programme of preventive techniques. This comprehensive view, quite naturally, leads to the demand for a central agency which can be placed in charge of the whole preventive work within the community, and the author therefore stresses the need for the establishment of Community Co-ordinating Councils, agencies which are playing an ever increasing part in American crime prevention schemes. From the detailed account given by the author it appears that there are now approximately 700 such Councils operating in the U.S.A. Their chief characteristics are that they are organised on a community basis in small places, and on a neighbourhood basis in big cities, that they bring together representatives of all organisations, official and private, who are interested in the welfare of young people, and that they emphasise the importance of lay participation. There can be little doubt that these Councils constitute the much needed centre for the scattered efforts in dealing with juvenile delinquency, a centre without which the left hand usually knows nothing about the doings of the right hand.

The final chapter gives an interesting account of the work of the author's own creation, the Michigan Child Guidance Institute, which, he claims, represents "a unique combination of scientific research, technical service, social action, and social organisation."

HERMANN MANNHEIM.

M. DOMKE, Trading with the Enemy in World War II. Central Book Company, New York, 1943. xv + 640 pp. **$10.**

Among the numerous works dealing with those branches of the law which originate in the present emergency, Dr. Domke's treatise on trading with the enemy occupies a distinctive place of its own because it is—as far as the present reviewer's knowledge goes—the only work which is truly comparative in character. Trading with the enemy is of course an international problem. It presents itself to every nation involved in this war. The courts of all countries—including those of the neutral states—have had to deal with it. In Dr. Domke's work all this material or at least as much of it as is now accessible on the Allied side has been collected and systematically arranged. American, English, Dominion law, the laws of the Governments-in-exile, German, Italian, Japanese, Hungarian law, decisions of Swiss and Swedish courts—all this vast and necessarily often dry material has been brought together here with a completeness for which every harassed practitioner using this book will feel truly grateful to the author. The author's copious references to the existing literature appear to include every article published in the numerous American periodicals, access to which is unfortunately now so difficult in this country. That nothing of importance in English and Dominion law has escaped him, goes without saying. It is no exaggeration to say that readers in this country cannot find the information which this book contains anywhere else and that it is therefore indispensable to everybody who is actively engaged in the problems with which it deals.

The range of these problems is fairly wide—wider than the title would lead one to suspect. The influence of war on contracts—treated so well in this country by Messrs. *Webber* and *Rogers*—is of course excluded, but apart from that the author has taken into his field of view (with one solitary exception) every question connected with the legal relations between the subjects of states at war with each other. His treatise embraces, therefore, a vastly wider field than our Trading with the Enemy Act. It deals at length with the procedural position of alien enemies, both as plaintiffs and defendants, with the position of resident aliens—friendly as well as enemy—with internees and prisoners of war, with the transfer of business places of corporations under Swiss, Belgian, Dutch and Luxembourg law, with the various decrees of the Governments-in-exile issued for the purpose of conserving national assets, and last but not least it contains a short but sufficient chapter on Foreign Exchange Control which very succinctly sets out the American freezing regulations and which forms a valuable supplement to Mr. *Barnett Hollander's* treatise on this subject.

Within so wide a range it was of course quite impossible for the distinguished author to give more than a survey of the existing law and its judicial interpretation. There could be no attempt at a critical treatment of individual questions which are not yet settled or of questions which have not yet engaged the attention of the courts. Here and there a little more detail would have been desirable, as, e.g., on the position of the Custodian of Enemy Property. It goes without saying that the climax of the importance of this branch of the law for the forensic practice has by

no means yet been reached. That will come after the war when the tangles now created will have to be unravelled. Some cases on the law of Trading with the Enemy in World War I were decided by the American courts as late as the beginning of World War II.

A work like the present leads one to speculate on the way in which this problem of unravelling will be solved. The author has of course seen this aspect of his labours, but he has refrained from giving more than a few very carefully worded indications of his train of thought. He is obviously in favour of vigorous and more original solutions than those so far envisaged. He points out how detrimental, in the past, has been the wooden conservatism which has characterised British and French reactions to the German pre-war currency restrictions. The author who, like the present reviewer, repeatedly stressed the peculiar character of German currency restrictions in pre-war times must have felt some melancholic pleasure in seeing his views confirmed by the official German statements that there is no need for any prohibition of trading with the enemy in Germany, because the existing currency restrictions were quite sufficient to exclude any such trading. He also points out how the foreign exchange restrictions adopted in this country at the outbreak of the war tended "rather to prohibit undesirable capital exports than to wage economic war against Germany": in more than one case was this weakness skilfully and promptly exploited by German agents, especially during the short period of Belgian and Dutch neutrality.

Most interesting is the author's deduction that the nationalisation and residence test in the law of alien enemies are gradually but clearly being superseded by what he calls the "loyalty test." This tendency is much more outspoken in the U.S.A. than in this country. In this and other respects a study of American legislative methods would bear rich fruits both for the criticism of our own law and for the solution of those post-war problems which this field will—one hopes soon—present. Thus there is in this country as yet no legislation formally exempting resident Austrians from the status of enemy aliens notwithstanding the formal declaration by the Prime Minister which counts Austria among the territories awaiting liberation. The same applies to Koreans, Albanians and other victims of pre-war Axis aggression, who are all excluded from the conception of enemy alien under U.S.A. law. Apparently our law does not yet formally admit that war was waged by the Axis countries long before the first shot was fired.

The author brings especially rich material on the refugee problem. This question, because it is novel in character, has suffered most from the lack of creative energy which characterised juristic thought in the democracies in the inter-war period. The systematic application of the loyalty test would have gone some way to avoid heaping further burdens on the victims of Axis oppression. Unfortunately no attempt at a clear-cut, logically acceptable solution was made. The resulting anomalies and inconsistencies generated fresh hardships. A German Jew who left Germany for France and emigrated from there in April, 1942, from Marseilles, then in the unoccupied zone, and resides now in the U.S.A., is paradoxically considered as an enemy by every belligerent party in this war. German law, of course, considers him as stateless and all his property within Germany and German-occupied territory is confiscated. His funds in France are sequestrated under the French Trading with the Enemy Act. In the U.S.A. he is not a "generally licensed national," because he acquired residence after February 23rd, 1942. His property in England, is under

the Trading with the Enemy (Specified Areas) Order No. 1, transferred to the Custodian of Enemy Property, and the fact that he is now residing on Allied territory does by no means result in its automatic release. The example has been given here at some length, because it illustrates the appalling results which follow when the well-known, but old-fashioned, conceptions are applied to the novel situations of our times.

One of the most interesting chapters in Dr. Domke's book is that which deals with the decrees of the Dutch and Norwegian Governments vesting the foreign assets of residents of their territory abroad in the Governments themselves. These decrees have created not inconsiderable difficulties. This was probably not fully realised in the decision of the New York Court of Appeal in *Anderson* v. *N. V. Transandine Handels Maatschappij*, where it was held that the Dutch decree was applicable in New York without regard to the rights of any creditors of the person whose assets are vested in the Government. In *The Estate of Emanuel Kahn*, however, the Supreme Court of New York held that in the administration of estates embracing property within the jurisdiction the local law is superior to rights created under edicts of foreign Governments. The Dutch Government withdrew its claim on the suggestion of the Surrogate and consented to the administration of the estate by the Public Administrator. In this country the authority of *Lorentzen* v. *Lydden & Co., Ltd.* is to the same effect as that of *Anderson* v. *Transandine Handels Maatschappij*, but it is perhaps significant that the Dutch decree was not pleaded in *V/O Sofracht* v. *Gebr. van Udens Scheepvart en Agentur Maatschappij*. There can be no doubt that both the Dutch and the Norwegian decree—however praiseworthy the intention is to preserve the goods of residents of these countries against any manipulations on the part of the enemy—are characterised by a regrettable disregard of the rights of *bona fide* creditors. The English regulations vesting property in the Custodian of Enemy Property at least envisage a settlement of *bona fide* debts out of the property vested in the Custodian after the war. But under the Dutch and Norwegian decrees all the creditor can expect is that his debtor may receive compensation which he may or may not use for the payment of debts which by that time will be long overdue and therefore doubly irksome.

As Dr. Domke's book is being brought up to date by the issue of periodical appendices there might be an opportunity soon of dealing with the one problem which has not found treatment so far and whose importance in the nature of things is quickly rising: i.e. the registration of claims against enemy debtors. Facilities of this character exist now both in this country and in the U.S.A. But in this country the regulations are curiously restricted: non-British residents can register monetary claims only; no claims can be registered for pre-war cases of spoliation, such as were frequent in the Sudetenland, Austria, Albania, and against Jews everywhere. Even British subjects who lost property in this way cannot register any claim. Registration is, of course, the necessary preliminary to the restitution of the wrongs done by Nazism and Fascism to those of their victims who reside on Allied territory. The existing regulations seem to indicate the intention to swallow Nazi and Fascist sham legality wholesale insofar as events in the period preceding the outbreak of the war are concerned. The Czechoslovakia (Settlement of Financial Claims) Act, 1939, has established an evil precedent, insofar as it distinguished between creditors in central Czechoslovakia who received satisfaction and those of firms in the Sudetenland who did not. The fear is widespread amongst victims of Nazi spoliation

that the unprecedented events from which they have suffered will be met by the "normal legal machinery," and that consequently substantial justice will remain a postulate instead of becoming a reality. A comparative and critical treatment of this problem would put the user of Dr. Domke's valuable book still further in his debt. E. J. COHN.

THE INTERNATIONAL LABOUR CODE, 1939. International Labour Office, Montreal, 1941.

As Mr. Phelan observes in the Foreword to this extremely valuable and important volume, "the most striking contrast between the discussion of post-war reconstruction which is taking place to-day and the discussions on the same subject which took place a quarter of a century ago is the shift of emphasis from a mainly political conception of the problem of world order to an essentially social and economic conception." How much of the great work done by the I.L.O. between 1919 and 1939 will be applicable to the post-war world, cannot yet be foreseen. But it is certainly of great value that the multitude of international conventions ranging over a vast variety of Labour matters, has now been collected and systematised, under the expert guidance of Mr. Jenks, legal adviser to the I.L.O. Patently, any post-war reconstruction must be based upon a large measure of international agreement on social, in particular labour, standards, and it would be as foolish to ignore the vast preparatory work done in many fields under the auspices of the I.L.O. as it would be to fail to study the causes of the comparative impotence of this excellent international organisation. The present volume abstains from any critical examination of this latter point, but it gives us a complete and most carefully annotated arrangement of the hundreds of conventions signed. There are twelve principal titles, the most important of which deal with general conditions of employment, employment of women and children, industrial health, safety and welfare, social insurance, the International Seaman's Code (one of the I.L.O.'s greatest achievements) and Standards of Colonial Labour Policy. Each of these is divided into numerous subsections, according to subject-matter; the whole goes a long way to justify the expression "Code" for what is made up of a multitude of individual conventions on very diverse matters. There is enough material here for an international "Beveridge Plan," and the present volume will certainly be an indispensable requisite of any future Conference which attempts to rebuild and further develop the social standards destroyed by Fascism and war. Where post-war methods must decisively differ from those of the twenty years between 1919 and 1939, is in the relations between states—and social groups within the states—and international authority. W. FRIEDMANN.

ANNUAL SURVEY OF ENGLISH LAW, 1940. Published for the London School of Economics and Political Science by Sweet & Maxwell, 1943. **15s.** net.

Lawyers will be very glad to see this invaluable annual analysis and survey of developments in all branches of English law continued, despite war difficulties. The present volume has appeared with considerable delay, but that hardly impairs its value, though a number of minor cases have naturally less interest now. A notable feature of the Annual Survey is the inclusion of Family Law and the Law of Persons as a subject, a forerunner, it may be hoped, of a more general recognition of the importance of these subjects.